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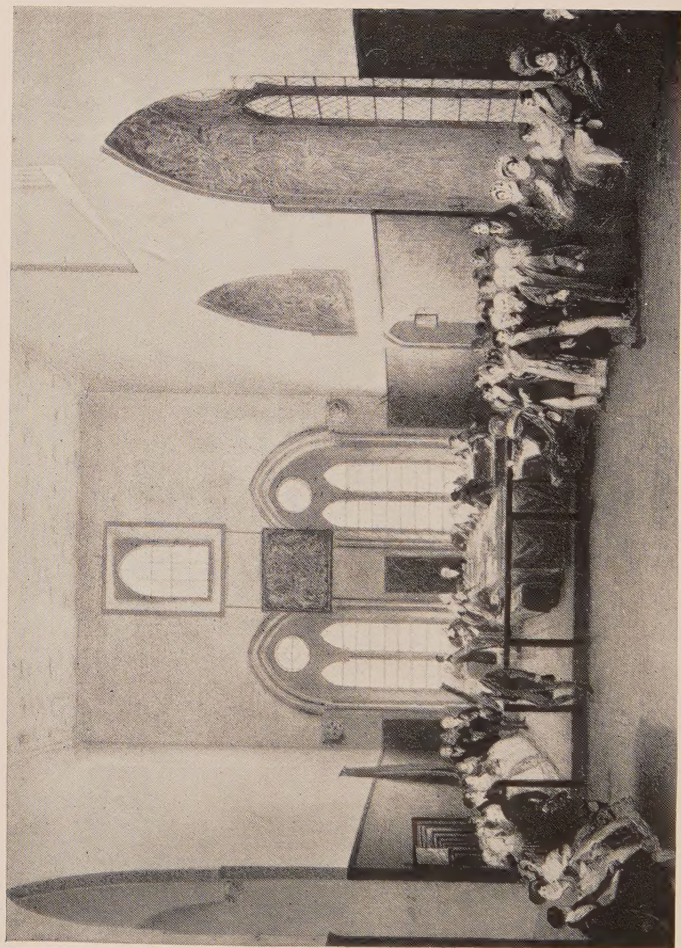
**THE HISTORY OF THE  
PRIVY COUNCIL**











THE COURT OF CLAIMS HELD IN THE PAINTED CHAMBER OF THE PALACE AT WESTMINSTER.

*Frontispiece.*]

# THE HISTORY OF THE PRIVY COUNCIL

BY SIR ALMERIC FITZROY, K.C.B., K.C.V.O.

WITH PORTRAITS AND ILLUSTRATIONS

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## INTRODUCTION

THE attempt to deal with so large a subject as the story of the Privy Council for the eight centuries or more of its existence within certain assigned limits may appear to some a foolhardy experiment which is bound to end in failure, but it appears to the writer that there are ways in which the problem may be treated which will give both spirit to the enterprise and offer inducements, among others, to a class of readers who are not, as a rule, attracted by what are commonly regarded as serious books. The drawback to the popularity of such books lies, as it seems, in their appeal only to the student, and the neglect of the interest which attracts the general reader, and it is at the inclusion of the last class that the author has aimed in his effort to give life and vivacity to his treatment of the material. It has not been possible in all respects to preserve historical sequence, as later conditions have often to be outlined in order to give coherence to developments that belong to an earlier stage.

The study of History cannot be looked upon as a process in which a uniform or even, in all cases, a kindred interest is expressed. It offers rather an inexhaustible store of inherited tendencies drawn from diverse sources, to which each century contributes growth or decay, and it is one of the strongest witnesses to the vitality of the King's Council that its adaptability to the uses of the hour or the needs of successive generations has not been affected by

time. It seems as if the genius of the Romantic Age which presided over its birth was ever recruiting its forces and reshaping its destiny.

In conclusion, besides the debt to the late Albert Dicey mentioned in the text, the author has to acknowledge the obligation he is under to the searching and luminous examination into mediæval conditions carried out by Professor Baldwin, of Vassar College, U.S.A., in his admirable and all-sufficing work on the King's Council during the Middle Ages and published by the Clarendon Press, 1913 ; to which must be added the generous and interesting contributions of Professor Andrews, of Yale University, to the elucidation of what is called the Colonial Period.

He also owes much to the conversations of his friend the late Sir William Anson, who while engaged upon the last revision of his book on *The Law and Custom of the Constitution* did much of his work in the author's room at the Privy Council Office, where he had access to the authorities he needed and was unsparing in the gift of his knowledge to his host.

Moreover, it fell to the lot of the present writer to increase the material available by taking the opportunity, as described in the text, to bring about the publication of the Acts of the Privy Council, "Colonial Series," whereby invaluable information extending over a long space of years was made accessible to the student during this period of the Council's activities.

The point of such annals, given just as they issued from the pen of the original writer, is that they speak for themselves in the inchoate tongue of the age with a force that no modern dressing-up could

impart. There is a tenseness and feeling in these lines which often become a touching witness to the past in the sidelights thrown upon the social and domestic aspects of the community.

Lastly, he has to record the most grateful acknowledgment of Lord Dunedin's kindness in granting him the use of his negatives for the reproduction of the illustrations contained in the text depicting sundry sittings of the Judicial Committee.





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# HISTORY OF THE PRIVY COUNCIL

## CHAPTER I

### MEDIÆVAL COUNCIL

THE germ of the Privy Council, like that of many other institutions which have ministered to the wants of a growing community, is to be found in the search, perhaps blindly but none the less assuredly, for a definite point upon which the instincts of a freedom-loving people can concentrate and find therein a principle of self-conscious expansion, not to say some abiding stimulus to development along the lines best calculated to give expression to their inmost conviction of need.

Transitional as their name implies and as we know them to have been, the Middle Ages stood rooted in the sense of the immutability of things. Unlike the ages of antiquity which preceded them, they had no fear of an inevitable decay ; still more unlike the modern world, they rested on no indefinite and unlimited hopes of progress. Their moral ideas were as fixed in the *cadre* of certain inherited obligations as their physical outlook was confined to the narrow order of accepted phenomena. Turning always on its own axis, the wheel of time was the symbol of an inexorable sameness.

It was characteristic of the Norman genius to seek its amplitude in giving space and virtue to

constructive forces, and the establishment of Norman influence upon a virgin soil and in an atmosphere of retarded institutional experiment endowed it with a unique opportunity of making that influence felt.

It is not a little significant of what was to come that in the fourth generation after the death of the Conqueror, scarcely a century and a quarter from that event, his descendant was forced by the assembled Barons to grant the Great Charter of English Liberties, to be succeeded in the ensuing reign by the convocation of a Council of the realm which established the principle of national representation in a direct and enduring form. Few if any examples of such a quickening of popular consciousness were to be found in mediæval history, and it is not going too far to attribute it to the innate impulse of Anglo-Norman opinion towards the path of political enlightenment.

In the eloquent words of Albert Dicey :

“ If any institution can claim a sympathy more generally accorded to human beings than to their works, the Council of the English monarchy may demand our especial interest. Its history stretches back to remote antiquity. Its powers rose amidst all the dangers of a barbarous age. For a long period it contained all that was noblest in English political life. The bearers of great names found within it at once the sphere and the reward for their talents.”

It is not without reason that England at the time of Magna Carta has been described by an American student<sup>1</sup> as “ the most perfectly logical feudal king-

<sup>1</sup> G. B. Adams, *The Origin of the English Constitution*.

dom to be found in Christendom," and it was upon such material that the forces of growth and expansion enjoyed their most fruitful increase.

The primitive arrangements of Saxon times once superseded, progress, with an interval of chaos during the reign of Stephen, was uninterrupted. The *Consilium* and *Curia Regis* of the Conquest had the merit of being elastic in character and adaptable in practice. From the first it appears in two aspects, that of a large body available on fixed occasions by general summons and a small body practically in constant session in immediate contact with the King. As a recent writer puts it, "all the functions of the State were exercised by a single institution under two forms, distinguished from each other only by size and manner of meeting." The King's Court, moreover, was not hampered by specialization, a characteristic not inconsistent with an effective control of all the agencies of government, inasmuch as it was a Royal Court, a Court of Justice, or a general assembly according to the needs of the occasion, and thus it became the parent of all the later machinery of justice, administration, and law-giving. The interchangeability of its various functions has been the difficulty of most commentators, but "once admit" with Mr. Round<sup>1</sup> "that in the feudal Curia, an institution of which the existence is undisputed, we have the common origin at once of the *Consilium* and of the *Curia Regis*, and all this difficulty vanishes."

This point conceded, we have the Law Courts, as we have known them within living memory, as the outgrowth of the latter, and the Privy Council

<sup>1</sup> *Peerage and Pedigree*, i, 349.

and the Great Council of Parliament of the other. The genius of the Angevin House for definition and the stiffening of accident into method gave shape and consistency to the process, though the most marked progress was reserved for the reign of the grandson and namesake of the great founder of the dynasty.

Moreover, the most distinctive feature of the English Council was the peculiar growth of an equitable jurisdiction apart from the Common Law. For this essential part of our history there is no parallel to be found on the Continent, for the records of England at this point are far more extensive than any discovered elsewhere. Thus M. Noël Valois significantly observes :

“ Quelle pauvreté est la nôtre, si l'on se reporte au temps où le Conseil intervenait dans les affaires politiques et dressait journellement des actes du plus haut intérêt pour l'histoire ! Qu'avons-nous à mettre en pendant des *Proceedings and Ordinances of the Privy Council* que l'Angleterre a su conserver ? ”

It has often been noticed that feeble kings make for constitutional growth, and ordered expansion in the ideas underlying it. Of this truism the reign of Henry III affords a conspicuous example. The statesmen of the time were the inheritors of the administrative energies characteristic of Henry II, and from Hubert de Burgh to Simon de Montfort the same spirit permeates their thought. M. Bémont in his *Life of the latter* remarks : “ C'est seulement à partir de Henri III, que l'on constate l'existence d'un conseil privé, nettement distinct, à la fois, du Parlement dont il vient d'être question, et de la

cour du roi,"<sup>1</sup> and Bishop Stubbs traces the formal beginnings of the Privy Council to that reign. Certainly the skeleton of the modern oath is discernible at that date, whole clauses being in substance the same.

Henry II was a king with a passion for administration, who was called upon to rule a nation in crying need of an administrator after twenty years of anarchy, and he had further a remarkably clear idea of its application to the demands of the moment. Hence the progress in departmental activity and subdivision of function which in the days of his grandson led to the conception of a responsible executive traceable throughout the reign of fifty-six years.

As Stubbs puts it, "The King's personal advisers begin to have a recognized position as a distinct and organized body, of which the judges and other officers of State and household form only a part,"<sup>2</sup> an opinion which perhaps with more prudence Professor Tout reduces to the appearance "almost for the first time of an inner ministerial Council which was ultimately to develop into the *Consilium Ordinarium* of a later age."<sup>3</sup>

It is not clear that anyone was conscious of the change if it existed, so that it must have been so far consistent with established usage as to excite no comment, or else it was of gradual formation too slow to be realized as anything new, so sedate was the procession of tendency in its occupation of the public mind. The existence of a regency

<sup>1</sup> *Simon de Montfort* (Paris, 1884), p. III.

<sup>2</sup> *Const. History*, ii, § 171.

<sup>3</sup> *Political Hist. of England*, 1905, iii, 29.



must obviously have modified traditional practice and it is probably going too far to discern the fundamental in methods of convenience. Thus there would seem to have been little more than the quickening and adaptation of the Council as already understood to the needs of new conditions. The attendance manifestly underwent some modifications, the presence of great magnates was unnecessary to the discharge of the minutes of daily business and it is certainly possible to say that professional lawyers such as Martin Patshull and Stephen Segrave were constantly associated in the Council with men of greater position. So far as it was not a matter of accident, those present were there in compliance with the requirements of the business in hand. At times the magnates appeared in force, at others a few bishops and barons were present with officials, a class which not infrequently remained alone for certain types of work.

It is interesting in this connexion to note that a special mention of these men occurs in the papal bull of 1223 which declared the King to be of age and recognized his right to govern *cum suorum domesticorum consilio*, exciting thereby the wrath of the Barons, who deemed their powers threatened. Their right to advise the King at all times was considered incontrovertible. It was, moreover, no sign of weakness but a source of strength of which he was proud for any mediæval king to have competent aid and counsel, so far was he from any absolutist claims to government. During the years of Hubert de Burgh's prominence it seems that conciliar action was infrequent, and that may have been one cause of his fall. Some have suggested

that he was the first to give the Council its initial organization, but the facts hardly point to this inference. His lonely supremacy was dangerous for any minister in that age, and the complaints of the Barons that he had made himself "the only counsellor" and that "he held his fellow counsellors for naught" were the direct cause of his downfall in 1232 after eight years of wise administration. The vitality of the Council at this date is shown by a letter of Gregory IX to Henry granting permission to the Bishops to assist at the King's Council, a practice that was perhaps more popular than the undiluted pretensions of the Baronage. The King's first step, however, in that direction was unfortunate, as on Hubert de Burgh's fall he was succeeded by Peter-des-Roches, the Poictevin Bishop of Winchester under whose influence and that of the Queen, Poictevin and Savoyard courtiers flocked into the country, to the intense dissatisfaction of native opinion, as it appeared designed to subserve royal authority at the expense of the baronial interest. Thus the middle years of the century were largely occupied by efforts to effect changes in the King's Council, generally with a view to the adequate representation of the Baronage, who not infrequently were the firmest advocates of popular claims. So in 1237 we see appointed a Council of twelve, and at their head an ecclesiastic—a compatriot of the Queen and not disliked in England—who was styled *consiliarius regis principalis*, and with him served some notable baronial figures. By way of special emphasis this is the first occasion upon which it is recorded that the councillors were sworn on the gospels to furnish faithful counsel, and still more

remarkably the King gave his oath to follow their advice. Further changes ensue by the entrance into the Council of men like Stephen Segrave and John Mansel, in connexion with the last-named of whom M. Bémont declares that the simple title "counsellor" gave him greater weight than the proudest Baron.<sup>1</sup> Another what we should call ministerial crisis arose in 1244, when, according to Matthew Paris, a particular scheme of reform was drawn up providing for the choice of four of the most capable and noble men of the realm to be of the King's Council and sworn to manage faithfully the business of the King and the realm, and though no such scheme was ever formally adopted, it was so far in the air that the King was constrained to appoint four such persons on his own initiative.

From this time onward there are constant references to the personnel of a limited Council and its smallness was a perpetual source of baronial jealousy. The efforts of the Barons to establish what we should call a broad-bottomed administration reached their height when, after the victory of Simon de Montfort, in 1263 one more signal attempt was made to organize and control the Council, under which letters patent in the King's name empowered the Earl of Leicester and two colleagues, one of whom was Gilbert Clare, Earl of Gloucester, to nominate nine councillors. The fall of the great Earl two years later caused the failure of the experiment, but the principle survived in the evidence we have of the Council's activity during the remainder of Henry's life.

The greatness of the cause at stake enables us

<sup>1</sup> *Simon de Montfort*, p. 112.

to realize the emotion of Simon, as he watched the gathering of the host embattled against him on the morn of Evesham, described as it is by Mr. Horace Round in his splendid estimate of the significance of Heraldry to historical scholars.

“ For them,” he says, “ the science of the shield has another and a worthier aim : to them it speaks in its own tongue on church and manor-house, on the monument and the seal ; it illumines those ‘ parchments and writings already musty with age,’ and makes the storied past live and move before their eyes. It brings to their minds the tournament and the joust, and the knight harnessed for battle. They think of Evesham, of the great Earl scanning the tumult of banners in front of that advancing host—his life hanging on the arms they bore. He saw at last the lions of England, the chevrons of the House of Clare,<sup>1</sup> and cried as the fatal coats told him that all was over : ‘ Let us commend our souls to God, for our bodies are the foe’s.’ ”

At this stage—the close of the longest reign in English history till the eighteenth-nineteenth century—we may pause to consider at what point of definition we have arrived. Naturally this is not the only time that new departures can be sought in the stress of a revolutionary epoch, yet in the flux and reflux of the forces at play it is perhaps not surprising to find that the net advance is small and so far as it exists one of tendency rather than accomplishment. Such changes as were effected had rarely a stable character, and the periods of the King’s virtual independence were in substance

<sup>1</sup> This announced that Gloucester had transferred his allegiance to the King.



less reactionary than some moments of baronial triumph. The Council at the close was not yet an organization apart from other bodies in the State, though it had reached the conception of an indispensable organ. There was a narrow approach to the acceptance of a group of councillors distinct from the *Curia* and the Exchequer, but the distinction was constantly blurred in practice. The great step, when it came, was due to the introduction of new methods of business which were imposed by royal authority and to that extent imported prerogative action. Thus with the growth of financial obligation there came about the withdrawal of the Chancellor from attendance at the Exchequer, where his place was taken by his clerk, thereafter to be known as the Chancellor of the Exchequer, indicative of a shifting of the balance of political power in that body and striking a line of severance between it and the Council.

The system of itinerant justice established by Henry I and extended by his grandson led to further specialization apart from the Council in the formation of (1) the Court of Common Pleas, as it came to be styled, and (2) the Court *coram Rege*, ultimately the King's Bench, when the Council felt it necessary to exempt itself from hearing the cases so handled, for the disposal of which a special and stationary Court was brought into being.

With the concentration of judicial business in courts apart from the Council, orders of the latter body often took the shape of legislative acts, to which no exception appears to have been taken. Indeed there was little disposition to draw any narrow distinction between a legislative and judicial act,



which is easy to account for upon the natural hesitation of the untutored mind to discriminate too closely between general rules and those applicable to individual cases.

The emancipation of the Council from this class of business left it in strict conformity to its ancient inheritance with "unrestricted procedure," a fact which, as Professor Baldwin goes on to show, "explains the vitality of that 'fertile parent stem' which, having put forth such mighty branches as the Common Law Courts, was not drained of judicial power or exhausted in its ability to create."

Out of this residue of power there emerged with ampler significance that right of petition to the King in Council which, if it is not exercised to the primitive extent, remains the elemental right of every aggrieved person.

As the present writer took the liberty to point out some years ago :

"Throughout the long period when few institutions rested on unassailable foundations, the right of the subject to invoke the King in Council and the forms by which that appeal was kept alive were the implicit impeachment of arbitrary rule and the asylum within whose fostering shelter the idea of personal right took shape and authority."

The development of the original germ is to be seen on two sides, the one towards parliamentary government and the other to the creation of a permanent body of Royal advisers qualified to render the Crown custodian of the subjects' safety. With the accession to the throne of one who was not only the "greatest of the Plantagenets" but perhaps the most dis-

tinguished figure in the whole line of English kings, both in personal attributes and sagacious statesmanship, an enormous impetus was given to the realization of the nation's identity. . . . It was Edward I's privilege to do more than any other to consolidate the realm to which he succeeded, but he had the design, premature as it turned out and unlasting the fruit of his labours, to establish the unity and cohesion of Great Britain as a single and homogeneous political entity. With the same passion for administration as Henry II, he brought to the task a wider survey of the situation and a more tempered application of the principles that shaped and fortified a mediæval State. He found the Council upon his father's death still in a condition of flux and formlessness not altogether recovered from the baronial reaction of the time, though this had to no small degree received a fresh bent from the popular sympathies of the far-seeing Simon, which Edward was not slow to imbibe. As Bishop Stubbs indicates, "having accepted its existence as part of the general system of government, it was his achievement to have given it definiteness and consistency." In this connexion we have to distinguish the permanent institution from Councils, which owed their shape to the stress of agitations such as interfered with ordered progress and clarity of aim in the previous and succeeding reigns, and to this end the work of Edward is particularly fruitful in instruction. Discerning in the Councillors' oath a pledge of stability and some guarantee of good faith, the regular practice of swearing councillors may be said to have originated with his accession. With it followed under the

same fostering care the natural development of a more orderly plan of government, of which the Council was the oldest and most important feature, having, as its permanent nucleus and mainspring, a body of officers employed in the King's Court and household, "the Chancellor, the Treasurer, and others of the Council" being the phrase in normal use, to which in no long time there came to be added with the increase of departmental activity the King's Secretary and the Keeper of the Privy Seal.

The objects of Edward I appear, so far as indications go, to have been directed towards rendering the Council in the last resort a professional body—a step which naturally provoked the hostility of the Barons in defence of what they regarded as their historic rights. This broke out into violence with the rebellion under Edward II, when "it was their particular aim not only to dictate the appointment of the King's ministers but to reduce the number of officers retained in the Council"; a policy that during the reign of Edward III, whose continental ambitions forced him to keep on good terms with the Baronage, resulted in a material reduction of the officers element; only the Chancellor, the Treasurer, and the Privy Seal being recognized as belonging to it in 1376, to which in the first year of Richard II the Chamberlain and Steward of the Household were added.

During the last half of the thirteenth century the oath was obviously framed to meet the case of officers invested with the judicial and financial duties, whether they were members of the Council or not; but towards the middle of the following

century the need no longer existed, as oaths for their respective offices had by that time been introduced.

Perhaps as a corrective to the feebleness and inconsequence of Richard II's rule, it was repeatedly enjoined by parliamentary ordinance that there should be summoned to the Council persons of judicial weight as advisers on all legal questions and that the justices should be constrained to give their attendance and counsel. It was customary also to retain, as at the present day, for work upon the Council a number of justices and other officers who had retired from their posts after a long period of service. There is ground, however, for belief that from early date in the reign of Edward III the justices and suchlike ceased as a class to be sworn of the Council, though still frequently summoned to attend its proceedings; while under Richard II they are described as advisers or assessors summoned on occasion by the authority of the Council. Clerks, too, of the Council under Edward I, and still more frequently under his son, were often detached for work scarcely distinguished from that of the Council, in spite of baronial opposition to councillors of inferior status.

All this goes to show that it was long before occasional needs ceased to regulate practice, and that steps taken to meet the demands of the moment may often have hardened into usage for which no principle of policy can be pleaded. A singular new departure was made by Edward II when one Carlo de'Fiesci, a Genoese financier, was retained as one of the King's Council; and in the following reign another merchant of the same city, employed in



raising money for the King, is styled *dilectus et fidelis miles et consiliarius*. Indeed with Edward III the habit of retaining councillors abroad, particularly lawyers, who pleaded for him in the *parlement* of Paris, became so common that the King was sometimes led to speak of his *consilium in partibus transmarinis*.

Another peculiarity of the Council lay in its relation to the formal sessions of Parliament, at one of which Maitland with some hesitation estimates among the number no less than thirty Bishops and Barons ; but this, if accurate, must be understood to refer to an enlarged session of the Council convened under special letters of business.

In the urgent measures taken to correct the misgovernment of Edward II, the body known as the Lords Ordainers appears to have been a section of the Council entrusted with drawing up ordinances providing *inter alia* for the removal of mischievous councillors. This was in no sense to supersede Parliament, to strengthen which was part of the Ordainers' commission by seeing that it met at least once a year. By this means the famous Parliament of Lincoln (1316) went so far as to form a Council in accordance with the views of the Barons under the direction of the first Prince of the Blood, the Earl of Lancaster, who was asked to preside, in compliance with the terms of an oath prescribed for the purpose.

The struggle, which turned on the point whether the government of England should be conducted by an aristocracy or a bureaucracy, was carried on with varying success, alternately resulting in the murder of Lancaster and the Despensers and at the



end in the deposition of the King, against whom the chief charge was that he had been controlled by "evil counsel" and had rejected the advice of "the great and wise men of the realm."

The whole course of the conflict was, it will be seen, characteristically English in method. There was no logical continuity in its design or progress, but a series of hand-to-mouth expedients calculated to meet the demands of the moment, and thus was almost automatically built up the structure of the Constitution from precedent to precedent. With custom as the plastic force that, while giving scope to primitive ingenuity, moulded these institutions, Englishmen, even in that early stage of their history, could look with composure on the features of change, however violent its superficial expression, confident that the genius of the national instinct for law and order would in the long run vindicate present extravagance and bring to maturity the golden mean of balance, judgment, and progressive illumination. It was contact with antiquity which gave colour to the hour and touched the future with a fore-glow of hopefulness and inspiration, and so gave buoyancy and assurance to the nation's outlook.

The jealousy of the Barons still remained a constant factor in determining the composition of the Council, and by unrelenting pressure they gradually succeeded in eliminating men of what they deemed an inferior caste, as in the words of a complaint actually made in 1341, "these same men now made themselves governors and counsellors more than their estate doth warrant"—a graphic example of the early intrusion of the democratic element

into the seats of the mighty. As an indication of the character of Parliament in the fourteenth century, it is not a little interesting to note that, in the Councils of Richard II, which were largely recruited under parliamentary influence, this class was practically excluded, whereas Edward II had a marked taste for the promotion of clerks, and Edward III, besides a partiality for foreigners, sought to a large extent to identify the Council with the royal bestowal of knighthood.

One effort of Parliament to maintain the purity of the Council was to insist upon the sacred necessity of the oath, which was irksome to the Baronage, and in one case at least resented by the highest subject in the land, as we find in 1386 the Archbishop of Canterbury was unwilling to be sworn, claiming as a general privilege of the Church of Canterbury the right to be present at all parliaments and councils "secret or other." A more signal claim to be exempt from the obligation—one that is consecrated by the prescription of five hundred years—was that of the Prince of Wales, who in 1410 was excused from taking the oath, imposed on others of the Council then appointed, as was stated, "because of his highness and the excellence of his honourable person."

The outcome of these disclosures as to the composition of the Council, when the Middle Ages drew to a close, is that it was a heterogeneous body of not much less than one hundred members, including "officers, prelates, barons, knights, clerks, honorary persons, foreigners, and favourites," most of them probably chosen for their personal services, a consideration of more weight than their collective

capacity, but among them there was always to be found a hard-working nucleus of pronounced official leanings, with no exclusive privileges arising out of the oath, which only served as an obligation of service and that not altogether binding upon certain elements of the whole. It may be serviceable at this stage to introduce a comparison between the mediæval Council and the Council as it exists to-day drawn from Professor Baldwin's luminous work on the subject :

“ The Council now is a large body of more than three hundred members ; it includes men of divers classes and political opinions ; its membership is mainly conferred as an honour, while the practical work is performed by various inner groups. But the likeness, however striking, is only a superficial one. The Council to-day stands out in all the clearness of modern definitions. Its membership, even though it does not necessarily impose any serious duties, is certain, since all councillors are formally sworn. The attendance of non-members would not be permitted : the early distinction of estates also is here practically obliterated ; and all confusion which lingered between the Council and the House of Lords as well as between the Council and other courts has been cleared away. Moreover, the title of ‘ Right Honourable ’ is an exalted one and is not associated with the ordinary grades of government service. The modern idea of a council in its privilege, its exclusiveness, and its mutual cohesion is almost the reverse of the thought of the Middle Ages. There are many steps yet to be taken, therefore, before the Council of the Edwards is transformed into its modern counterpart.”<sup>1</sup>

<sup>1</sup> Baldwin, *The King's Council*, p. 102.

An element of confusion in tracing the identity of the Council throughout this epoch is the unfortunate mediæval habit of giving different names to the same thing, which has led commentators into all sorts of by-paths, conducing to no elucidation of the problem, but only landing the inquirer in deeper perplexity. The use of Latin in all the earlier documents failed to make the task easier until happily French translations of the old tongue clarified its meaning and enlarged our information. As Maitland puts it: "There lies a besetting danger for us in the barbarian's use of a language which is too good for his thought."<sup>1</sup> There can be no doubt, notwithstanding the extreme variety of the terms employed, that there was only one Council, though, as we have seen, it passed through many stages of growth and bore different descriptions, as circumstances and the uses to which they were put dictated. There is therefore but a passing interest in the record of the terms in current use. Thus *privatum consilium* or *secretum consilium*, *magnum consilium* or *consilium ordinarium* are the earliest and most frequent variants, obviously referring, the first two, in synonymous terms to its normal character, and the last indicative of the Council in full session or on the small scale more usual. With the fourteenth century a further extension of the qualifying adjective came into currency, such as *bonum consilium*, *plenum consilium*, *sapiens consilium*, *totum consilium*, *commune consilium*, characteristic of the view that the person using them severally took of the occasion which suggested their employment, but in the use of none

<sup>1</sup> *Domesday and Beyond* (Cambridge, 1897), pp. 225, 334.



of them is any obscurity implicit and they all may be clearly used to describe the same institution. The important point is that it finally emerged from the twilight of ages under forms through which the modern institution is able to trace its descent and becomes easily recognizable as the offspring of the parent stem.

The real fact was that throughout the stormy episodes of the time when the size and the composition of the Council was the bone of contention between the different parties to the struggle for supremacy in the King's Government, each was concerned, in order to establish its own pre-eminence, to play tricks with the nomenclature of the past by the use of terms which justified their own pretensions. Thus historical pundits have fallen into the habit of fighting with shadows and, in the desire to give symmetry to the evolution of events, have allowed their bewilderment at the want of precision characteristic of our ancestors' use of language to obscure their judgment and to disturb their interpretation of the terms employed.

To quote the verdict of a recent authority of undoubted weight :

“The main fact which takes away all reason for subdivision, is that the *consilium regis* unqualified by any adjective was inclusive and flexible enough to answer all the purposes required of the great Council, the secret Council, and the ordinary Council ”—

a conclusion at which the present writer had arrived independently.

Throughout, however, the period upon which



we have now entered, a series of troubles, universal in their extent and catastrophic in the result—wars of conquest, economic convulsion, dynastic rivalry, and religious revolution—all in the course of two centuries overtook the country, decimated society, and went to the root of all those inherited ideas bound up with the stable organization of the past. The Hundred Years War, the Black Death, which at the lowest computation accounted for one-fifth of the people, the Wars of the Roses, and the overthrow of the mediæval Church, at which crisis England changed her religion four times in the course of two generations, were incidents under the pressure of the narrow limits within which they occurred, charged with a devastating effect upon national character and security.

It is no little wonder, with these dynamic shocks to terrify and bewilder the community, that the time was one of savage crimes and ruthless cruelty, unstable purpose and humiliating compromise, which in the sphere of both civil and religious thought led the nation to place its faith and safety in pawn to the masterful pretensions of the Tudors, and the illustrious line of time-serving statesmen whom they brought into prominence.

## CHAPTER II

### TRANSITIONAL

RESUMING the development of the Council during these years, subject to any influence direct or indirect that the events which signalized them may have produced, it will be seen that the reign of Richard II was conspicuous for a new departure in its framework and atmosphere, and in regard to the last it is permissible to inquire whether the scourge of the Black Death with its demoralizing effect upon all classes was not largely responsible for the *outré-cuidance* and fanatical presumption which invaded bodies like Parliament and the Council during the early part of this epoch. It is in no sense waste of labour to investigate the teleology of much that is distressing in public events both from the point of view of grave moral disturbance and the habit of mind which those who have studied the effects of epidemics on a stupendous scale discover to prevail among their immediate consequences. These, it is suggested, may afford a very ready clue to the loss of self-restraint, the extravagance of design, the hardness of outlook and mutual suspicion which ravaged England in the wake of the catastrophe.

In regard to the framework of the institution, Stubbs considers that "the Privy Council from the reign of Richard II onwards, although it inherited and amplified the functions of the permanent Coun-

cil of Edward I, differed widely in its organization," and evidence is forthcoming from various sources in confirmation of that opinion. With the accession of another minor the Council, as in the case of Henry III, emerged from its normal background, and in becoming for the time the depositary of the ruling power brought the whole question of its organization and pretensions into the full light of day, and thus suggested the occasion for a fresh attempt on the part of Parliament to regulate its composition and control its functions.

These efforts were not confined to the reign in question, but, according to Professor Baldwin, extended from the year before Richard's accession, when Edward III was in the last throes of senile impotence, to the conclusion of the sixth Henry's minority in 1437, and were mainly restricted to three points: (1) appointment and removals, (2) judicial prosecutions, and (3) regulative provisions. The problem arose with all its completeness in the nomination of the Council of Regency, which, it was insisted, should contain "persons of the different estates" besides the great officers, and that fresh elections should be held annually, when none of those previously elected should be re-eligible for two years, an obvious precaution against entrusting supreme power to a permanent oligarchy. Another modification of primitive practice was the enactment that some, if not all, the councillors should be paid for their services, a provision of very doubtful prudence, though probably included through the difficulty of keeping the Council together without some

remuneration for their withdrawal from other occupations.

Much of the suspicion of Parliament seems to have been due to the unpopularity of the Duke of Lancaster, who at that date had not won the "time-honoured" esteem with which he was subsequently invested; indeed, he seems to have been the most unpopular man in the kingdom, except among the followers of Wickliff. The next few years were occupied with perpetual wrangles aggravated by a bankrupt Treasury and the Wat Tyler Revolt, for neither of which was there any prompt remedy, while in the meantime the situation struck terror into the would-be revisers of the Council and suggested the wisdom of a more discreet interference. In fact there was something hopelessly amateur in the methods employed, and administrative incompetence sought its only screen in truculent self-assertion. No constitutional principle was involved, the agitators on either side having no more important object than to determine what interest should prevail, until the struggle was brought to an end by the murders and impeachments which sullied the vengeance of the "Merciless Parliament" of 1388, when it was sought to give anarchy a respite by the appointment of a continual Council, in which the "Lords Apellant," Gloucester, Arundel, Derby, etc., who had been prominent in the recent troubles, were given the principal place. Richard himself at last closed the standing crisis with one of those acts of impromptu energy of which he was capable at supreme moments, by entering the council-chamber and with his own voice declaring himself of age in words, as stated in

the Chronicle: "I will call whom I will to the Council."

The aims of the discontented Baronage, under the guidance of the King's uncles and Lancaster's son Derby (later Henry IV), were consistently directed to maintain control of the Council, a policy as consistently thwarted by Richard's dexterous strokes, whereby in the net result the Great Council of the Edwards was brought into the shape which it was the King's wish to give his Privy Council, as it now came to be called. Thus at the Council of February 1392, attended, besides the usual officers, by a score of Lords and Bishops, the Lords gave the King under their hands solemn assurance of loyalty and constitutional conduct, and took from Richard on his word as a king a pledge of amnesty for past misconduct, promising that impeachments under the authority of Parliament should not be revoked.

A session of the Council in 1395 has the distinction of receiving a minute record by no less famous a chronicler than Froissart, who tells us that as he was not admitted to hear the proceedings he approached that ancient and valiant knight, Sir Richard Stury, and asked him what had been done. "Having mused awhile he said he would tell me, for it was not worth while to conceal what must shortly be made public. . . . Undeterred by his oath of secrecy," proceeds Froissart, "Stury told me everything word for word as I have written it."

The remaining years of Richard's reign were a period of great activity on the part of the Council, now attuned to the King's desire. Among a host



of minor matters which were well within its competence, the claim of the Council to alter the statutes and make ordinances beyond what was contained in Acts of Parliament ministered to the King's arbitrary instincts, and, though they had been causes of bitter complaint in the past, seem to have gone on without let or hindrance, especially in regard to the export of wool, a matter of which Parliament was very jealous. A further assertion of independence was connected with their judicial activities, which took the shape of a kind of equitable interference with the Common Law unregulated by prescription or convention, which was a source of constant friction between the King and Parliament, thus largely contributing to the catastrophe that awaited the monarch.

The last two years of the reign became under these conditions a period of undiluted absolutism, when the King was avenged on his adversaries without, as it would seem, any fear of reprisals. The country, however, was full of turbulent and discontented nobles, some of them closely connected with the Crown, and it was upon Gloucester the King's uncle that the first stroke fell, and his cousin Henry, now Duke of Lancaster, would probably have shared his fate, if he had not got out of harm's way by self-imposed exile. So infatuated was Richard by the assumed success of his scheme that the return of Lancaster came as a complete surprise and was as fatal as unexpected.

The deposition which followed turned practically upon the validity of his dealings with the Council, the charge being against his alleged declaration that "the laws were in his own mouth," and he

suffered from the fluidity of law and practice in the matter. No doubt Parliament had tried to limit his discretion, but the attempt had never reached legal enactment; and if the King was entitled to choose his councillors, the prescriptive claim of the Baronage had as little the force of law, but for the moment it disposed of the strength of the kingdom.

It is fair, however, to say in extenuation of the King's fall that the supporters upon whom he relied in the Council were by no means *novi homines* or the creatures of a debased favouritism, but men bearing honourable names and many of them cadets of noble houses, such as Stafford, Scrope, Clifford, and Percy, and the list is also interesting by the appearance of names afterwards to become famous in history, such as Devereux, Beauchamp, de Vere, Russell, Bagot, and Waldegrave.

The business of the Council was, moreover, of a character which vindicated its claims to the credit and confidence of public opinion, matters considered being largely of a class affecting general interests and in the main dealt with by the professional members of the Council. Larger issues were sometimes tried, as the case already mentioned, of which Froissart is the chronicler, when the Government of Gascony was at stake as to whether a new charter granted by John of Gaunt was valid against an earlier instrument of Edward III. The Council was summoned to meet at Eltham on July 22nd, 1395, to hear the deputies from Aquitania in antagonism to the claims of Lancaster, which may account for Froissart's remark that many of the Lords seemed afraid to speak, the weight of the

Duke of Gloucester, "who was much feared," being thrown against the deputies on the ground that it would be an abuse of justice to annul a grant which had been made with the unanimous consent of the Council—an opinion which drew from Derby, Lancaster's son, the remark, "Good uncle, you have spoken and further explained the matter and I support what you have said."

The accession of a king with a precarious title was not likely to strengthen claims to arbitrary rule, and the Lancastrian dynasty throughout its story showing itself sensitive to parliamentary criticism, the Council thus became a formidable power in the State. Indeed, Bishop Stubbs goes so far as to say, "The Council of the Lancastrian kings is the real, though perhaps not the historical germ of the cabinet ministries of modern times," an opinion which at any rate serves to show the distance travelled from the Norman *Curia*. However that may be, the official weight of royal influence was no less strong and led to frequent rivalries in the forms of government. For the moment, indeed, the disturbed state of the kingdom in reaction to the recent *coup d'état* kept both King and Barons absorbed in local contentions, so that the Council's work was of no great importance, the great Lords upon whose support Henry leant not being able to give regular attendance. In order, therefore, to maintain a competent staff to perform ordinary duties, the King had recourse to the officials at hand, some of whom had been trained under Richard's rule, notably one John Prophet, the first Clerk of the Council with an acknowledged name, now Dean of Hereford, later

known as the King's Secretary and ultimately (1406) Keeper of the Privy Seal, an agreeable example of legitimate promotion.

Henry's good relations with Parliament can be traced in the choice, as councillors, of two successive Speakers of the House of Commons, John Durward and Sir John Cheyne, and with dying words he is said to have commended the loyalty of the Erpinghams, the Watertons, and the Cheynes, all leading parliamentary families. Prominent members of the City in return for financial aid were also admitted to the Council, another feature to give it a modern flavour, among them the famous Richard Whittington, a leading mercer, who had supplied the King's household, when Earl of Derby, and had recently furnished his daughter with bridal outfits. Included in the promotion to high office of conspicuous men we note the appointment to the Chancellorship of Bishop, afterwards Cardinal, Beaufort, and of course a member of the Council, whose responsibilities were enhanced by such preferments. Its work was mainly concerned with administrative questions and grants due for services rendered, of which there were many in connexion with the late revolution. Parliament, too—a sign of no little confidence—turned over to the Council a number of petitions for adjudication, besides confirming its power to make ordinances in several directions of utility.

It seems singular in these circumstances to find that the attacks on the Government lay not in the tyranny but in the weakness of the Council, a phase of not probably more than normal discontent. Thus in the revolt of the Percys (1403) one grievance



prominently mentioned was the non-payment of arrears for military service, and another the need of more councillors for the advantage of the King and the realm. Certain specific but undisclosed complaints followed on the meeting of Parliament (1404), when Henry announced that "at the strong instance and special request made at divers times in this Parliament by the Commons," he had ordained certain Lords and others to be of his *Great and Continual Council*, a step which in the session of the ensuing year led to the Commons voting their subsidies willingly in the great confidence they had in the Lords elected and ordained to be of the Continual Council, although it was seen that the difficulty in securing the attendance of these great persons was no less insuperable. The list included the Archbishop of Canterbury, the Bishops of Lincoln (Chancellor), Rochester, Worcester, Bath, and Bangor, the Duke of York, the Earls of Somerset and Westmorland, Lord Ross (Treasurer), Thomas Langley (Keeper of the Privy Seal), Lords Berkeley, Willoughby, Furnival, and Lovell, Messrs. Piers Courtenay, Hugh Waterton, John Cheyne, Arnold Savage, John Norbury, John Durward, and John Curson.

Criticism was renewed in 1406, when the Commons spoke with "exasperation in demanding an account of all public moneys." "Kings do not give account," was the curt answer. "Then their officers must," was the rejoinder. Under stress of this further inquisition the King himself framed a Bill naming a Council and defining its powers. The insistence of the Commons was endorsed by Henry, who went so far to meet their wishes as to enforce



the oath which was taken, as stated, "at the instance of the Commons and by command of the King," and led to the parliamentary plan achieving a success unknown to previous efforts. No small measure of this result was due to the tactful intervention of the Prince of Wales, an unusual instance of an heir-apparent in active support of his father's Government. His popularity was no doubt of great use in making sure of public confidence in the dynasty. The appreciation of the Commons culminated in a prayer to the King, to thank the Prince and all other Lords and officers of the Council who had loyally fulfilled their promises, a step which the King took in state, with the Prince and his colleagues kneeling before him. These operations serve to show that, apart from the wild side of his youth with which popular historians have busied themselves, the young Prince from the first took a most sagacious view of the obligations of kings and their responsibility for the well-being of the people.

With his accession to the throne two years later, a change of government, as we should call it, took place, with consequent changes in the personnel of the Council. Beaufort was recalled to the Chancellorship and Arundel to the Treasury, but in other respects he pursued the policy associated with his name for the last three years, inspiring the Council with ideas formerly imposed upon them by Parliament, and on his departure to France in quest of another crown he left the administration in the competent hands of the Duke of Bedford with the charge "to do all things with the consent of the Council." Throughout the reign, however, the

Lords took little part in public affairs, France and their own affairs absorbed their interests, and the work of the Council was left in the hands of bishops and officers. Enjoying as it did the confidence of Parliament, the Council was entrusted with a large amount of business, including legal problems and judicial questions involving recondite consideration, with the result that it was never more active in bringing law-breakers to justice.

With the premature death of Henry V, the Council for the second time in forty-five years was confronted with the anxieties of a regency, which, without affecting its status as a normal instrument of rule, largely increased the scale and weight of its obligations. The difficulty was to call it into being, but this was got over by the Duke of Gloucester and a group of magnates, who assumed extraordinary power to issue writs for summoning Parliament in the name of the Duke as "Lord Commissioner" with the advice of the Council, that body being subsequently named in Parliament and expressly chosen by the Lords thereof. In this body, says Stubbs, "every interest was represented and every honoured name appears": indeed all of them were men who had figured in the Council of Henry and gave proof of his care and deliberation in choosing his advisers. In all these proceedings we are struck with the dexterity of those concerned in adjusting the forms of the Constitution to the call of a sudden emergency without compromising the validity of the principles at stake. These men showed a sense of their value by dictating the terms whereupon they were ready to serve, which proved of a most comprehensive kind, while nothing was to be done



THE DUKE OF BEDFORD, PROTECTOR.  
From a picture in a MS. in the British Museum.



without a quorum of six or at least four of them. The list is as follows :

Duke of Bedford, Protector.

Duke of Gloucester, Protector during absence of the former.

Archbishop of Canterbury.

Bishop of Durham, Chancellor.

William Kinwelmersh, Treasurer.

John Stafford, Keeper of the Privy Seal.

Bishops of London, Winchester, Norwich, and Worcester.

Duke of Exeter.

Earls of March, Warwick, Northumberland, Westmorland, and the Earl Marshal.

Lord Fitz Hugh, Chamberlain.

Ralph Cromwell, Walter Hungerford, John Tiptoft, Walter Beauchamp, Knights.

In several respects the Council stood in a very different position from that of Richard's minority, as it was not subject to annual dissolution and reinstatement ; there was no sign of the power being in the hands of a circle of officials and favourites, and its relations with Parliament were of a most harmonious character. The scale of payments for ordinary members was :

An Archbishop . . . .	£200	Other Bishops . . . .	200 <i>m</i> .
A Duke . . . . .	£200	Earls . . . . .	200 <i>m</i> .
The Chancellor . . . .	£200	The Treasurer . . . .	200 <i>m</i> .
Henry Beaufort . . . .	£200	Barons & Knights . .	£100

The Duke of Bedford and the Duke of Gloucester, whichever was serving at the time, received 8,000 marks. If a member of the Council held any other office, it was the rule that his salary as a councillor was to be proportionately reduced with a deduction



for absence of £1 or 1 mark per diem, the barons of the Exchequer being instructed to accept the statements of the councillors when tendering their accounts.

The Council thus became a heavy charge upon the Treasury during the minority, for, besides the payment of Bedford during his presence, Gloucester was paid liberally as "Chief Councillor" next to his brother, and on a still bigger scale when Regent later in the King's absence; indeed, the Treasury was often unable to meet the assignments on behalf of the Council, which in some cases fell twelve years in arrears. A curious statement made by the Lords exhibits the grandeur of the power exercisable in these terms:

"The execution of the King's authority belongeth unto the Lords spiritual and temporal of this land at such time as they be assembled in Parliament or in Great Council, and else, they not being so assembled, unto the Lords chosen and named to be of his Continual Council"—

a succinct description of the great powers of the State in active operation at the time. The Chronicles of the day show that, besides their legitimate rewards, members of the bodies concerned did not serve for nothing, and in many cases their rapacity was only equalled by their quarrelsomeness.

The King's nonage ceased in 1437, and on November 12th he made his declaration of independence before the Council and granted formal confirmations to the officers and councillors of their present positions, with some modification of salaries in the direction of economy. Gloucester and

Cardinal Beaufort were at the outset its principal members, but they both died in 1447, and the withdrawal of Northumberland from active participation in its proceedings further diminished its independence, but it is probably going too far to agree with Stubbs that "it became again a mere instrument in the hands of the King and the Court." Thus they at once sought to put some restraint upon Henry's subservience to the wants of his friends and in the matter of grants brought his activities within the effective cognizance of the Council. With the disappearance of Gloucester and Beaufort, the greatest power in the Council was exercised by William de la Pole, the 4th Earl of Suffolk, of a family never popular with the Baronage because of its mercantile origin, whose conduct of the peace negotiations in France, however unpopular with the war party, had gained him the confidence of the King and the still more powerful patronage of Margaret of Anjou. The discontent of the Commons led to Suffolk's impeachment in 1450 upon the charge of having allured the King to the "impoverishment of the royal domains," and that without the knowledge or assent of the Lords of the Council "he had brought about the convention with France." Jack Cade's revolt, moreover, took up the complaint "that the Lords of his royal blood have been put from his daily presence, and other mean persons of lower nature exalted and made chief of his Privy Council." Further demands were endorsed for the removal of "evil counsellors" and the taking about the King's person of such "true Lords" as the Duke of York and others of his friends.

It is not a little remarkable that persons like Jack Cade and other filibustering demagogues of that age appear to have set so much store upon the King being dependent on the advice of men of his own blood or suchlike quality, instead of the "mean persons" who intrigued themselves into his confidence to serve their own ends.

The reconstruction of the King's Council was now the leading object of the malcontents, with the Duke of York at their head, in reply to whose letters of protest the King promised to "establish a substantial council, giving them more ample authority and power than ever we did before; in the which we have appointed you to be one." York was too much thwarted by his colleagues to effect any real change, but, having gained the support of Parliament, he passed the Resumption Act of 1451 and did something to bring certain of his adherents into the Council. Two years later civil war in the North, the humiliation of the fall of Bordeaux, and the failure of the King's health brought matters to a head. A Great Council was held on November 21st, at which the Duke of York attended, upon special letters of invitation from his friends, and was at the pains to declare that "he was the King's true liegeman and subject, and was ready to work with all diligence," for the good of the King and his realm, to which end he pledged himself to see that the Council was purged of unworthy elements and restored to the good repute of past times.

In the helpless condition of the King the Lords declared that the Duke of York should be chief of the King's Council with the designation of "Protector and Defender of the Realm." The Duke

accepted the position, and after some deliberation on the part of the councillors respecting their status it was enacted by common consent that everything in the King's gift should be disposed of "by advice of the Protector and Council."

For more than a year the Duke's decision was accompanied by a return to the ancient forms of conciliar usage, but in spite of his avowed policy the attendance was confined to his own adherents, letters of summons being addressed to some twenty-four Yorkist Lords, and these letters were repeated in an admonitory form on four or five occasions during the year; but whether the Council met in small or large numbers, there was no difference in its organization or methods, the size merely adding to its impressiveness and thus further tending to obscure the distinction between the Privy Council of convenience and the *magnum consilium* of special occasions. Meanwhile the Council applied itself with energy to the problem of quelling disturbance. The parties to the civil war in the North, including the Duke of Exeter and Richard Percy, were called to answer for their conduct, when the Earl of Northumberland was invited to be present in the downright terms " (we) think your presence here with us and our Council should be right expedient." No attention, however, was paid to either summons; the Duke of Somerset, being a prisoner, was more easily dealt with, and a Great Council assembled to consider his case, the Protector justifying his arrest on the ground that it had been ordered by the Lords of the Council "at that time being of great number," which supplies further evidence of the prestige attaching to size.



With the return of the King to health in 1455 Somerset was released and regained power. In the reconstruction of the Council which ensued the claims of the Duke of York appear to have been overlooked ; but after the battle of St. Albans he again assumed the title of Protector in a parliament opened on July 9th, and proceeded to busy himself with the restoration of a Council which should not be Lancastrian in its sympathies ; but with the improvement of the King's mentality in the early part of the following year his influence waned, and by the Queen's exertions in that behalf his commission as Protector was withdrawn.

War between the two factions was now inevitable, but with true English pertinacity, some might say bluntness, the attempt to clothe its preliminaries in constitutional forms was still maintained, by no one more resolutely than by the King, who with " pathetic urgency," as it has been described, continued to remind the Lords of their duty, and in his directions for a Great Council at Westminster in November 1457 wrote, " We shall have noon excused of his comyng to our said Counsaill in any wise that oweth to be there " ; and in a letter to the Earl of Arundel it was innocently explained, " We called our said Counsaill in especial to sette apart such variances as ben betwixt divers Lordes of this oure reaume "—a piteous revelation of the dissidence against which he was struggling. In the following year, August 1458, recourse was had to a still more persistent and expostulatory form, when among the thirty-three deemed to be of the Council there was included the Duke of York and at least a dozen of his adherents. When in 1460 his claim



to the throne was asserted, a tardy effort to mark revolutionary proceedings by an appeal to legal authority was frustrated by the reluctance of the justices concerned to adjudicate upon subjects of conflict between rival factions, each claiming control of the State, on the ground that the matter "must needs exceed their learning" as "between party and party they were not of the Council," for which deliverance we cannot commend their modesty or prudence too highly

One of the signs of the decay of the Council lay in the tendency, as it became more impotent, to revert to its earlier aspect, when the reluctance of the Lords to attend led to the prominence of lesser men of no political interest or importance.

The useful intervention of Parliament, which might have been looked for from the fact that the mediæval House of Commons had at this date reached the highest pitch of constitutional weight, failed to make itself felt owing to the circumstance that all rivalry between the Legislature and the Council had ceased, both being, as it has been shown, controlled by the same oligarchical and administrative group.

It is impossible to say farewell to the Lancastrian Council without mention of Sir John Fortescue, Lord Chief Justice of the King's Bench in the last years of Henry VI, whose great work *On the Governance of England* is full of lessons on the failure of that body with all its good intentions to be equal to the occasion. He is a strong advocate of its aristocratic quality, commending its being chosen "off grete princes and off the gretteste Lordes off ye lande both spirituelles and temporelles, and also off oyer

men that were in grete auctorite and offices," maintaining the last class in a subordinate position. He does not advocate any parliamentary control, but would limit the King's power in so far that councillors should only be removable for some definite offence and then only with the consent of their colleagues. The King should give them his complete confidence, "and not be counseled by men of his chambre or his householde, nor others which cannot counsele hym"; and the councillors should take "no fee nor clothyng nor no rewarde off any man except only off ye Kinge." He does not think much of any scheme to enforce secrecy, as things, he believes, must come out, owing to the miserable garrulity of those concerned and their habit of chattering to their advisers and servants.

He attributes much of the misfortunes of England to "oure Kings been ruled by private counsellours, such as have offered their services and counceils and were not chosen thereto," and complains of the tendency among the King's regular councillors when they do come together to be so occupied "with their owne maters and with the maters of thair kynne, seruantes and tenants, yat thai entendet but little and oyer while no thyng, to ye Kinges maters."

In conclusion he strongly urges, what does not seem to have been the practice, that all the acts of the Council should be "putt in a boke and that boke kept in this counsell as a register or a ordinarye, how thai shall doo in every thyng." In spite, however, of all the weaknesses and deficiencies so graphically described, he remains at the end a



W. Faithorne sculp.



S<sup>r</sup> John Fortescue K<sup>t</sup> Lord Chief Justice & Lord  
Chancellor of England vnder King Henry. y<sup>e</sup> Sixth.





disciple of the Council in preference to Parliament or the King.

At this point of the Council's evolution there is an almost complete failure of contemporary records for the space of eighty years, 1460-1540. Of its constitution at this time, says Sir Harris Nicolas, "nothing appears to be known, although there are traces of the belief that in the years up to 1485 the Council reached the highest point of importance as the Great Executive of the nation." It may, however, be, as an eminent authority has suggested, that the failure is due to a cessation in the activity of the Council itself. As late as the year 1455 mention is made in Parliament of the "Book of the Council," and Tudor writers no doubt refer to documents, implying the operations of a Council, the title of which has not come down to us. The form, moreover, of the records when they reappear in 1540 does not suggest the revival of a chronicle which has undergone a long lapse.

On the other hand, there are considerations pointing to the drying-up of the sources of information drawn from the experience of Lancastrian times, when even if direct knowledge was inaccessible there is a mass of collateral *data* derived from many quarters which would justify the conclusion that the Council was still in full activity. Applying this analogy to the evidential values forthcoming in the reign of Edward IV, it is, as Professor Baldwin significantly points out, no mere accident that all collateral sources, such as the Rolls of Parliament, the Statute Rolls, the Patent Rolls, the Issue Rolls of the Exchequer, and the year books of the time are almost equally silent. "Everything," he concludes,



“tends to strengthen the impression that for a number of years immediately following the revolution of 1460-1, the activities and responsibilities of the Council, while not entirely suspended, were reduced to a minimum.”

There is a distinct reticence about the formation and uses of the Council, which seems to have mainly consisted of Lords and Bishops who held office or enjoyed personal relations with the King and a number of knights, and squires, dependents of the King by virtue of their tenure of household offices or some other such claim on his confidence through connexion with the Court. There were among them Doctors of Law in some force, whose ambition to be employed on embassies secured their fidelity to the Crown. The great Lords uncontaminated by these influences were conspicuous by their absence. Royal authority was everywhere in evidence, though for all the dry-as-dust details of administrative dullness the formula *rex de avisa-mento sui consilii voluit et mandavit* was in constant use. The distinction between the councillors attending the King and those stationary in London left no doubt in the public mind which had most weight in tendering advice. The personal qualities of the King must not be overlooked in determining the constitutional values of the changes. Edward IV was a man of formidable powers in many directions, cemented by an attractive manner and approach, and talents for dissimulation which in the difficulties of his position were of sovereign importance. With fits of indolence native to a pleasure-loving temperament, he could be as hard and resolute as the occasion required and at times ruthless in prosecuting

his purpose. In fact, there have been few men on succession to a throne who showed themselves better fitted to fill the place to which they were called at a moment of stress and transition.

Upon a wide survey of human affairs, few things are more remarkable than the part played by individuals in extricating communities from the tangle and confusion incidental to seasons of upheaval when, out of the shock to established order and the impetus thus given to anarchical doctrines, some forceful character seizes the reins of power and imparts to the tottering fabric that element of stability of which it stands in need. It is this task which Edward IV assumed, and it is to his credit that he in a large measure succeeded in the endowment of the new system with virtues of vitality and coherence. The contrast to the preceding régime was striking. In place of a Council which with all its imperfections was an impressive instrument of rule there was at every point of contact an emphasis of royal interference. Grants of the Crown were made by the King with rarely expressed consent of the Council, and few of the letters patent under the Great Seal were attested *per consilium*. Among the statutes of the realm, moreover, none of the new Acts seem to have been framed by the Council, nor was it charged with their execution. Indeed, the departure from form was about as general as it could be made short of the complete elimination of that body. To the subservient official section alone were important functions entrusted, particularly foreign missions which directly touched the King's confidence.

In the last years of Henry VI the Council's

judicial functions had been largely in suspense, and during the first years of his successors the bulk of the cases it was formally asked to try seem to have been dealt with by the Chancellor to an extent that at one moment threatened the whole jurisdiction of the Council, though even at this pitch there still remained occasions when the King maintained its competence and willingness to act. The Chancellor's prestige, however, seems to have figured most largely in the minds of suitors, though it may be argued that petitions were often addressed to him as a means of approach to the Council. In this atmosphere of doubt and confusion the King's status as the supreme dispenser of justice necessarily weighed upon public opinion with impressive force, and there is no question but that popular esteem was no small factor about this time in bringing the Star Chamber<sup>1</sup> into prominence and repute. The troubles of the times must also be taken into consideration in determining the preference given to one form of petition or another, and the perplexities of the officers of the Court are well reflected in the plaintive observation of a Clerk of the Council a hundred years later in explaining the ambiguities of procedure at this date when he says, "And the tyme alsoe when he served was in division between the two Houses of Lancaster and Yorke. By which means the Actes of the Counsell were not so exactly kept and conserved as they are now." The appointment of two clerks in the first year of Richard III is evidence for what it is worth that suitors in considerable numbers were actually seeking the remedies afforded by the Council.

<sup>1</sup> See below, pp. 46, 47, 118.

## CHAPTER III

### TUDOR DEVELOPMENTS

#### *Henry VII*

WITH the advent of settled rule and sagacious statesmanship under the government of Henry VII there is ample evidence, in spite of the lack of original records, that the King was determined not only to rehabilitate the Council, but to endow it with still greater opportunities of service for the public weal. Thus within a few days of his entry into London in September 1485, a clerk was nominated and the new Council installed. In this Council there were five Peers, of whom four were new creations, two bishops, Morton the Chancellor, afterwards Cardinal, and Courtenay, Keeper of the Privy Seal, a scion of the old aristocracy, and nine others. The number swelled rapidly, and by the first year of the sixteenth century had reached, according to the roll of those present, forty-one, including thirteen Peers and nineteen knights and commons, *et cæteri*, among them such persons as members of the King's household, royal chaplains, and clerks. The dignity of being sworn and admitted with due formality was for some time limited to Peers. Henry himself gave the Council exceptional attention. In the words of Bacon, "To his Council he did refer much and sat oft in person, knowing it to be the way to assist his power and inform his judgment," a delicate compli-



ment which he probably intended for the edification of the wise King's more famous granddaughter. So used were they to his presence that the Council was even reluctant to continue its sittings in his absence, as appears from a note which brings the term to an end on May 1st, 1489: 'Continued be all and singular appearances [that is, suits] . . . because the Kinges Majestie is goeing into the North with his armie.'

The diligence of the Council often extended to holding as many as four sittings in one week, a large part of its work being properly that belonging to the section known as the Star Chamber; but its preoccupations included general business of a political character, as a suggestion to send a diplomatic mission to Calais to treat with the Emperor concerning trade relations with the Netherlands. On another occasion ambassadors from France appeared in the Court, but refused to open their business until they had been brought to the King's presence. Domestic concerns of an economic and moral character also commanded attention in the appointment of a commission to provide for the reformation of idle people and vagabonds as well as the enormity of apparel and the excess of meat and drink and other fare—a sufficiently formidable enterprise for the most energetic reformers. No separate records of the Court of Star Chamber being made, these are therefore that of the Council in session at Westminster, judicial business being its chief concern.

The main policy of the Government was to put an end to the disorders with which the country had been afflicted for close upon a generation, when it was recognized that it was not the want of statute



law which was in question, but the slackness of the authorities in enforcing its execution. To this end the Lord Chief Justice delivered an impressive statement, arraigning by implication the highest in the land, for the neglect of their obligations.

“The law,” he said, “will never be executed until all the Lords temporal and spiritual are persuaded, for the love and dread which they have of God or the King or of both, effectually to execute them, and until the King on his part and the Lords on their part shall make each other do this, and if they will not they shall be chastised and punished.”

An ordinance followed to restrain rioting by the servants of Lords, and to make their masters responsible for bringing them to justice in the King’s Court and for enforcing upon them any penalties imposed by the Court, “so they shall be answerable for default to the King and his Council.” This ordinance is the fitting preamble to the Great Statute of 1487, afterwards known as the statute *pro camera stellata*, which, whatever the odium righteously incurred in later times, was the foundation of social order at the date of its enactment. The character of the legislation may be summarized under certain heads :

(1) It was a reversal of all former conditions that Parliament, which had usually felt bound to oppose and limit the authority of the Council, should now give it a large measure of support.

(2) Recognizing the evils of livery and maintenance. “Riots, unlawful assemblages, murders, robberies, and perjuries had so increased till the policy and good rule of this realm is almost subdued.”

The Act was therefore designed for "giving the Court of Star Chamber authority to punish" these misdemeanours, and the leniency of the Government and the failure of the Courts was now to undergo a substantial "reformation of the premises."

(3) The number of cases, both suits and prosecutions, now absorbing the time and attention of the Council called for the separation of such business from interests touching the King more closely, and for the first time an effort was made to set apart sessions of the Council for judicial purposes.

(4) The uncertainty of the respective jurisdictions of the Chancellor and the Council called for definitions. Hitherto many of the cases above indicated might have gone with equal propriety to the one or the other. It was now stated with all possible clearness that the criminal cases specified belonged peculiarly to the Council, while by implication the bulk of the cases in equity were left to the Chancery.

(5) The need of a Court of suitable number and of a fair degree of regularity in attendance was also appreciated, and to this end it was enacted that the Chancellor, the Treasurer, and the Keeper of the Privy Seal, or two of them, should summon a Bishop and a temporal Lord, together with two of the justices, preferably the chief of each Court, but the rule as to numbers was only regarded as indicating the general intent.

(6) Cases were to be brought to the Court "uppon bill or informacion put to the seid Chaunceller." But it was soon found that practice hardened upon traditional forms, and petitions in most cases for this Court came to be addressed to the King, to the King and Council, or to the Lords of the Council.

(7) Finally, it was acknowledged that in the class of offences mentioned the operations of the Common Law had been ineffective. "Nothing or little may

be found by inquiry," i.e. by jury, the statute said ; and this being admitted, the principle was carried to the sanction and legitimation of certain summary forms of conciliar action which, however liable to abuse, were recognized at the time as necessary in the shape of peculiar writs of summons and inquisitional examinations.

In concluding what he has to say on the subject, Professor Baldwin observes " that while other branches of the modern Council were soon formed, it is particularly the Court of Star Chamber which is to be regarded as the institutional continuation of the original mediæval Council."

An offshoot of the Council which came into being about this time was the Court of Requests, due to the pressure of business which led to a further differentiation of the Council's work, as it proved beyond the power of the Star Chamber to deal with it.

" After a few yeares King Henry VII seeing his court pestered with sutours and sometymes out of due season " allotted to certain members of the Council the task of " the expedition of poore mennys causes depending in the Starred Chambre." The duty of furthering the wants of poor suitors had always formed part of the Council's work, but its allocation to a separate Court was not undertaken till 1493 and proved another instance of Henry's solicitude for a neglected section of his subjects. At first, like the more intimate division of the Council, it followed the King about the country, a circumstance perhaps of some advantage to the poor litigant, but early in the ensuing reign it became fixed at Whitehall.

Sir William Anson indeed places its origin at this date, attributing it to Wolsey, when Chancellor, "for the expedition of poore mennys causes depending in the Starred Chamber," a pleasing trait in a man of his proud nature, to which end an ordinance of King Henry VIII's household provides that of "those members of the Council in constant attendance upon the King, two shall sit daily in the Council Chamber at certain hours to hear poor men's complaints." Certain lawyers, styled "Masters of Requests," were added and sworn of the Privy Council, but without precedence as members of such. The Court claimed no statutory authority, but its usefulness prevailed over the doubt thrown upon its legitimacy. Its president was the Lord Privy Seal. It did a large business throughout the reigns of James I and Charles I, surviving the Act for the abolition of the Star Chamber. It fell into abeyance during the Civil War and the Commonwealth, but was revived by Charles II as a popular act.

A further differentiation of the Courts at which informers might present themselves was brought about by the Statute of Retainers, 1503, and with the change (probably because of it, suggests Professor Baldwin) a new office came into existence, that of the President of the Council, "*coram Presidente consilii domini Regis*," being the form in which it first appears (1497) in a contemporary treatise, when he took place above Keeper of the Privy Seal, in the proceedings of the Court of Requests. He does not appear to have been regularly appointed till 1529, when an Act of Parliament gave him the place, at present held after the Chancellor and the Treasurer, an office not then in commission, and



before the Privy Seal ; while when sitting in the Star Chamber, it was declared, upon the nomination of the Duke of Suffolk to the office, that he was to exercise " the same authority as belonged to the Chancellor." Finality, however, was not reached in giving the Council that followed the King the character that led to its becoming the direct parent of the Privy Council we know to-day, until Henry VIII took the matter in hand by the enactment of a certain ordinance for the " establishment of a Councell," the purpose of which is thus explained :

" And to the intent, that as well matters of justice and complaints, touching the greaves of the King's subjects and disorder of his realme and otherwise, which shall fortune to be made, brought and presented unto his Highnesse, by his said subjects in his demurre or passing from place to place within the same ; as also other greate occurrences concerning his owne particular affaires, may be the better ordered and with his Grace more debated, digested and resolved, from time to time, as the case shall require ; it is ordered and appointed by his Highnesse, that a good number of honourable, virtuous, sadd, wise, experte and discreet persons of his councell, shall give their attendance upon his most royall person, whose names hereafter follow."

There were twenty names mentioned, of which Cardinal Wolsey, Chancellor, the Duke of Norfolk, Treasurer, and the Bishop of London, Keeper of the Privy Seal, were the most important, the President not being mentioned, presumably because the office was at the moment unfilled. However, the name of its future occupant, the Duke of Suffolk, Marshal, follows, and after him the Marquesses of



Dorset and Exeter, the Earl of Shrewsbury, Steward of the Household, the Lord Chamberlain, the Bishops of Bath and Lincoln, Lord Sandys, Sir W. FitzWilliam, Treasurer of the Household, Sir Henry Guilford, Comptroller of the Household, the Secretary of State, Sir Thomas More, Chancellor of the Duchy, the Dean of the King's Chapel, Sir H. Wyatt, Treasurer of the King's Chamber, the Vice-Chamberlain, the Captain of the Guard, and "for ordering of poore mens complaints and causes Dr. Wolman"; a body obviously representative of the best manhood in the State and selected with a view to give the King the most capable aid to be obtained, down to meeting the needs of the humblest subjects in the realm.

It was further ordered—

"to the intent the King's highnesse shall not be at any season unfurnished of an honourable presence of Councillors about His Grace with whom His Highnesse may confer upon the premises, at his pleasure, that the *persons hereafter mentioned* shall give their continual attendance in the causes of the said Councill, unto what place soever his Highnesse shall resort,"

and lest some of those named should perchance be absent for reasonable cause, it was provided particularly that the Bishop of Bath, the Secretary, Sir Thomas More, and the Dean, or at least two of them, should always be present ;

"there to be in readinesse, not onely in case the King's pleasure shall be to commune or conferre with them upon any cause or matter, but also for hearing and direction of poore men's complaints on matters of justice."

The King's resolve at all costs to have the services of Sir Thomas More within reach affords no bad example of the Tudor instinct for reliance on the best advice available, and the zeal displayed so persistently for the interests of the poor is no less worthy of notice. Hereafter, as constituted in two bodies of equal status but strongly contrasted influence, the Council had a dual development, whereunder the division permanently attached to the King's person soon partook of far greater political significance. A register of its work with the evidence of the councillors' attitude towards such matters as they were called upon to handle, as well as a reliable record of the Council's proceedings, shortly grew to be of such grave necessity to the conduct of the State that in 1540, when it may be said to have assumed its final form, "a clerk upon the said Council" was required to write, enter, and register "all its decrees, determinations, letters, etc." To the position thus called into being there was appointed William Paget, late Secretary to the Queen and the founder of a great house, chosen by the King and sworn in his presence—a process which is now superseded by a declaration before the Lord President.

With the consolidation of this new form of the Council a fresh book of the Council dates from this epoch. Although there is evidence that the traditions of its Lancastrian precursor were not forgotten, it is in no sense a continuation of the earlier book, but a result of the reorganization of the body to which it belongs. In the words of Professor Baldwin it is—

"the special development of a branch which during the Middle Ages had never advanced beyond a

rudimentary stage. The direct descendant of the parent stem was more nearly the body at Westminster . . . for ever associated with its home, the Star Chamber."

With the growth of its specialization as a judicial authority it became more and more unpopular, until it was abolished by the Long Parliament under a load of public obloquy.

Another change came into vogue about the same time, more superficial than real, in the admission of a distinction between "the ordinary councillor" and the "Privy Councillor." Thus in 1535 Sir Robert Wingfield took occasion to say: "I have been sworn of [the King's] Council above twenty years and of his Privy Council above fourteen years." The distinction, such as it was, intended to imply a disparity between social status and professional accomplishment, but it was often blurred, as in the case of Dr. William Peter, of whom we are informed that he was sworn of the King's Council, while a little later he is mentioned as "one of the ordinary Council." Historic usage in these cases was stronger than contemporary forms, as in the announcement made by Henry in 1541:

"His Highness had determined that to-morrow my Lord Chancellor, assembling His Majesty's Counsellors of all sorts, spiritual and temporal, with the judges and learned men of his Council, should declare unto them the abominable demeanour of the Queen."

The strength of Henry's position in his quarrel with the Church lay in the lavish use he made of

its confiscated estates to silence discontent and reward reliable servants. Cromwell's proposals in 1534 "to appoint the most assured and substantial gentlemen of every shire to be sworn of the King's Council, with orders to apprehend all who speak or preach in favour of the Pope's authority," furnished the executive with a stout body of local notabilities pledged to promote the royal designs, and they were assisted by the sessions of the Star Chamber and the Court of Requests being devoted to proceedings of this kind. The result, however, was not always favourable, as, incited by the attacks on the Church, for which the Privy Council was known to be largely responsible, the northern counties burst into rebellion in the famous Pilgrimage of Grace, one of whose articles of complaint was the statement that "the King takes of his Council and has about him persons of low birth and small reputation, who have procured these things for their own advantage, whom we suspect to be Lord Cromwell and Sir Richard Riche, Chancellor of the Augmentations." These the King was asked to remove and such heretical Bishops as those of Lincoln, Canterbury, and others, and to take noblemen into his Council. Some went so far as to bind themselves by an oath "to expulse all villain blood from the Privy Council." These imputations so far stung the King into action that he condescended to make direct reply, in which he textually challenges the assertion that at the beginning of his reign he had more nobles in his Council than now, pointing out that at that date he had only "two worth calling noble," the one Treasurer of England (now Duke of Norfolk) and the other High Steward of the House-



hold (the Earl of Shrewsbury), and adding "it does not belong to any of our subjects to appoint us our Council." To the Emperor who had taken the same line he retorted :

" Answer has been given to the ambassadors that the King will not change anything that has been settled by Parliament and therefore do nothing they ask, much less reform his Privy Council to please them, as it is a thing in which they have no right to meddle."

Henry was a formidable controversialist when he took the pen, as even Luther was forced to confess.

For the ends he had in view the Tudor genius taught him to trust the Council and endow them with the power to carry out his wishes. He was ready to act for himself on questions of policy, but in matters of administration he left both initiative and discretion to his Council and they repaid his confidence with judgment and energy. An innovation which testified to the cordial understanding that prevailed was the reception of foreign ambassadors in Council and the King's practice to make his communications to them in the same open manner. The occupation of the Council in these ways had, however, the disadvantage of withdrawing them from other obligations, and in the result there was a great block in judicial business and it became largely a matter of accident or favour whether litigants obtained the opportunity of a hearing, while at the same moment time was wasted by enforced attention to all sorts of trivial charges, including casual remarks at the expense of the executive. Thus one man was dealt with for having said :



“ There was never more need to pray for the King’s Council than now ” ; another for the remark : “ The King has wise men in his Council, but *sapientia hujus mundi, stultitia est apud Deum.* ” Perhaps the King’s concessions to the Council in certain directions may be regarded as arrears of debt for his emancipation from the tutelage of that body in respect of the grants of the Crown, which in the wide field of favour were jealously withdrawn from “ its advice and consent.”

Here may be a suitable place to mention that Henry’s ecclesiastical legislation set free a small juridical rivulet which in the process of centuries served to swell the stream of conciliar jurisdiction. Upon the breach with Rome it became necessary to provide some ultimate Court of supreme authority, and accordingly the Submission of the Clergy Act (25 Henry VIII) gave the subject a right of appeal for lack of justice in any of the Courts of the Archbishops to the King in Chancery, who thereupon appointed delegates with a commission under the Great Seal to review and finally determine the matter in issue. The Court of Delegates thus constituted continued in being till 1832, when ecclesiastical appeals were transferred to the King in Council, and in the following year there was created the Judicial Committee of the Privy Council, in which the hearing of these appeals was vested and is still exercisable.

Other later outputs of conciliar activity might be cited as the Council of the Welsh Marches and the Council of the North, which serve to attest the flexibility of the parent stem for the purposes of government, a flexibility, it may be added, which

has never failed to be adaptable to the latest needs. "The Council," says Professor Baldwin, in putting into a sentence the summary of its history, "never lost its elemental freedom of action," and this feature is no doubt the source and secret of its vitality. At this phase of its development the organizing genius of the Tudors was powerfully assisted by the arrangement of concentric groups among which its powers could be conveniently distributed. It is not easy to say to what results it may ultimately have tended, if the normal course of Henry's administration had not been so rudely disturbed by his domestic troubles and the ecclesiastical revolution which they brought in their train. No stronger step was taken towards the solution of pressing wants than the division of labour between the section of the Council following the King and that concentrated at Westminster, and the contrast between the earlier and the latter years of the reign must always be invoked to point out the moral of lost opportunities.

Nothing is more remarkable in this connexion than the deterioration of the King's character. Setting aside the dominant qualities and supreme influence of Wolsey, the first and greatest of our Foreign Ministers, what a change in the associates of the King from Warham, More, and Fisher to Cranmer, Cromwell, and he who afterwards became the Protector—Somerset; and the root-cause of the catastrophe lay in the misfortune of the divorce, and the pusillanimity of the Sovereign's advisers in their deflection from right thinking and prudent action, which dictated his marriage to Catherine's successor.

Without going so far as the poet of the next century, who wrote the line :

“When gospel truth first dawned in Bullen’s eyes,”

it cannot be denied that this step was the active agent in the King’s deterioration, and the part taken by Cranmer in promoting it must ever remain an ineffaceable stigma upon his memory. So stout a Protestant as Lord Chancellor Campbell has to admit, “I must feel a higher reverence for Sir Thomas More than for Thomas Cromwell and Thomas Cranmer.” All Henry’s actions during these middle years, so different from early promise, bespeak unbridled passion and self-will, and the breach with Rome is the most conspicuous example of this state of mind. An *autoritaire* type of religion was obviously his preference, and he proceeded to give the situation a humorous turn when, upon getting rid of the Pope, he went as near as he could towards investing himself with all the attributes of the position.

The Council at the time was acutely divided as to its religious complexion, a state unfavourable to any calm deliberation upon the nation’s needs and sympathies ; Cranmer, Cromwell, Russell, Audley, and Southampton represented the forces that were moulding the new forms of doctrine, while the Dukes of Norfolk and Suffolk, Sir Anthony Brown, Sir William Paget, and Gardiner clung to the old faith, but with just enough discrimination to save their faces in the King’s esteem.

The Anglican communion thus came into existence as an *œuvre d’occasion* and may seem to some to illustrate the French proverb that such works are

the most lasting. In this case, however, the author of it was not without some scruples towards the end. The Act of the "Six Articles" went as near as possible towards the re-establishment of the leading doctrines hitherto associated with Catholicism, including transubstantiation, auricular confession, the communion in one kind, and clerical celibacy, and, according to Gardiner's announcement at Paul's Cross in 1553, there were at least two occasions when the King was on the point of making his submission. There is much to fortify this belief, as Gardiner should have had full information on the point, for in the summer of 1541 he was in treaty with the Emperor, who showed himself quite ready to forget the injuries Henry had inflicted on his aunt in return for active support against France and the Turks; moreover, Chapuys, the Imperial Chancellor, talked, though with bated breath, of the King's submission to the Pope as a probable event.

Gardiner himself is said to have been overtaken with contrition for his time-serving laxity, when upon his death-bed he is alleged to have said, "*Negavi cum Petro, exivi cum Petro sed nondum flevi cum Petro.*" Into such perilous passes does the thirst for accommodation characteristic of supple minds lead their possessors, and yet one can hardly condemn the temptation that assails them to bring men to one mind at moments of grave national crisis.

With the promise of a long minority upon Henry's death, the Council sprang into prominence, and in one of the first statutes (Unlawful Assemblies) of Edward VI we find that conspiracy to kill or imprison any of the King's most honourable Privy



Council "shall be judged high treason." The Council, moreover, in explaining Somerset's deposition in a memorandum which they thought fit to lay before the Emperor, mentioned the devolution of the ruling power by the late King to sixteen councillors whom he especially trusted, and that the Duke of Somerset, not being content with his position, obtained the highest place and title of Protector of the Realm. However, he vindicated his fame at the last, for, as Froude says, he was a great gentleman and died as such. In his last year Edward drew up certain regulations for his Council, of which, according to Bishop Burnet, "he seems to have considered much and been well pleased with." In commenting upon them, Dicey, while qualifying the description as not altogether applicable to the actual facts, declares that in the main it gives the best conception of the Council as it existed in the hundred and fifty years of its highest authority, from the accession of Henry VII to the sixteenth year of Charles I, a period when "the history of the Council is the history of the regal power"—that between the victory of Bosworth and the meeting of the Long Parliament. He proceeds: "During its course, the Church was revolutionized, the crowns of England and Scotland were united on one head, the power of the Parliament first counterbalanced and at last overtopped the might of the prerogative. Nevertheless, to anyone who reviews the history of the Council, these hundred and fifty years present a certain semblance of unity. They might be described as the age of 'government by Councils,' and exhibit in the strongest colours the merits and defects of a system nearly as different from



the rule of Henry V as from the ministerial government of Victoria.”<sup>1</sup> Edward’s Council was composed of forty persons, divided into what we should call Committees, of which barely one-third were Peers and not all of ancient lineage, a change which implicitly increased the power of the Crown, though of great national advantage, by bringing to the front men whose promotion was the reward of merit.

The Committees were :

(1) For hearing suits—a power limited by the obligation to send to the Common Law Courts “those suits that be for them.”

(2) A committee for the calling of forfeits done against the laws and for the punishing of the breakers of proclamations.

(3) A committee for the State.

(4) A committee to look to the state of the Courts.

(5) A committee of Defence. Bulwarks.

#### LIST OF COUNCILLORS<sup>2</sup>

- (1) The Bishop (sic) of Canterbury.
- (2) The Bishop of Ely, Lord Chancellor.
- (3) The Lord Treasurer.
- (4) The Duke of Northumberland.
- (5) The Lord Privy Seal.
- (6) The Duke of Suffolk.
- (7) The Marquess of Northampton.
- (8) The Earl of Shrewsbury.
- (9) The Earl of Westmorland.
- (10) The Earl of Huntingdon.
- (11) The Earl of Pembroke.
- (12) The Viscount Hereford.
- (13) The Lord Admiral.
- (14) The Lord Chamberlain.
- (15) The Lord Cobham.

<sup>1</sup> Arnold Prize Essay, 1860, p. 39.

<sup>2</sup> Burnet’s *Reformation*, vol. ii, p. 121.

- (16) The Lord Rich.
- (17) Mr. Comptroller.
- (18) Mr. Treasurer.
- (19) Mr. Vice-Chamberlain.
- (20) Mr. Secretary Petre.
- (21) Mr. Secretary Cecil.
- (22) Sir Philip Hobbey.
- (23) Sir Robert Bowes.
- (24) Sir John Gage.
- (25) Sir John Mason.
- (26) Mr. Ralph Sadler.
- (27) Sir John Baker.
- (28) Judge Bromley.
- (29) Judge Montagu.
- (30) Mr. Wotton.
- (31) Mr. North.
- (32) The Bishop of London.
- (33) The Bishop of Norwich.
- (34) Sir Thomas Worth.
- (35) Sir Richard Cotton.
- (36) Sir Walter Mildmay.
- (37) Mr. Solicitor.
- (38) Mr. Gornold.
- (39) Mr. Cook.
- (40) Mr. Lucas.

At the King's death the Council was distracted between the claims of Lady Jane Grey and the Princess Mary, but rallied to the support of the latter by the exertions of Cecil and Paget and later Gardiner, who became Lord Chancellor. The reign holds no lesson for posterity and may be dismissed as the bloodstained carnival of a terrified and despairing soul.

Thus far in its long and chequered career has the Council been carried, and with a significant persistence it has preserved much of the quality

belonging to the early and almost amorphous period of its being. From the first it was a body rudely foreshortened, fluctuating in aim, undefined as to the limits of its interference, and with no rigid restraint upon its functions and authority, but just because of this vagueness and plasticity it became elemental material of the first value out of which the fortunes of a growing State could be moulded and the needs of men fashioned to the realities of life. It was an instrument of which a too logical race would have disdained the use, but it was none the less a reserve force of pliancy and opportunity fitted by intuitive adaptability to all the requirements of an expanding civilization.

A salutary feature of the survey in all its multifarious stages is, on the whole, the confidence which the Council enjoyed and the soundness of its title to it. The record, in short, testifies to the wholesome judgment of the people and the discretion with which it was exercised in the face of many obstacles and perplexities. A nation, like an individual, must be judged by its works, and tried by this test, England, as her history bears witness, has no cause to shrink from the verdict.

With the coming of Elizabeth we seem for the first time to command an outlook upon the modern world of which she was the precursor and her reign the prelude, with the formation of the Colonial Empire, the passion for discovery, and the stimulus to seafaring. The men of that generation seem to have been born to a new life and to be the heirs of a new inheritance. Before, however, taking up the evolution of the Council under novel conditions and a greater amplitude of purpose, there are still

left some aspects of the primitive organization that require a rather more detailed elucidation than the importance of preserving historical sequence has hitherto permitted.

As to Edward's regulations, their main distinction is the care taken that every matter should be brought under the royal notice, and that the Secretaries should be a channel of communication between the councillors and their master. The growing prominence of these persons is fully emphasized by the light thrown upon their importance with the gradual assimilation, at least in germ, of the Council to the modern Cabinet. From 1485 the position is occupied by men of greater weight; thus the Secretary of Henry VII becomes Bishop of Exeter; his successor, Dr. King, was considered suitable to sign a treaty with Portugal, and from the period of Thomas Cromwell the Secretaries took rank with Barons of the realm and became *ex-officio* members of the Council, from which the elevation to be Secretaries of State was a mere step. The change brought about by the Reformation in the status of the Bishops, who were now dependents of the Crown, ministered to the same result in undermining the independence of the Council. One or two of Edward's regulations confirm this tendency most unmistakably. Thus the Council were ordered on Saturday morning to "present this collection [of business done in the week] and know the King's pleasure upon such things as they have concluded"; or again, that "if there arise such matter of weight as it shall please the King's Majesty to be himself at the debating of, then warning shall be given whereby the more shall be at the debating of it."

With the shrinking of its independence, the power of the Council increased. Poynings' Act of 1495 placed the Irish Parliament under its rule, and during the same reign Jersey and Guernsey were brought under the direct government of the Council, to be followed by the constitution of the Councils of the North and Wales, which, it was said, ruled over a third of England and were framed on the model of the Privy Council.

Henry VIII, moreover, obtained from the servile Parliament of 1539 that "proclamations made by the King's Highness with the advice of his honourable Council shall be obeyed and kept as though they were made by Act of Parliament." These became frequent in the reign of his daughters and covered every conceivable subject. The rigour of their imposition was enhanced, as it became the special care of the Star Chamber to enforce the observance of proclamations "not yet made into statutes."



## CHAPTER IV

### CONCILIAR MACHINERY

AT the outset of conciliar story the functions of the Exchequer were not confined to revenue, but in actual substance it worked as a kind of agent for all types of business not handled elsewhere, and even as late as Edward I prominent persons belonging to the Council were there occupied upon the summons of special writs for such time-honoured duties as the nomination of sheriffs, while much of the work of Parliament was left to the Council for settlement in the same place, where also the oath was often administered to members of the Council. It also in process of time became the depositary of treaties, and hence was naturally used for the transaction of diplomatic business which the country's continental commitments in Gascony and elsewhere rendered necessary. Judicial duties, too, were not restricted to revenue cases, as the special procedure attracted other classes of suitors ; it was through this gradual divergence of practice that the growth of separate courts finally came about, through its power of infinite adaptation to the needs of a more complex social organization ; the germ being found in the use of the Exchequer for certain sittings of the *Curia Regis*. The Common Law was slow in meeting the requirements of the day, and so led to the Council in session at the Exchequer becoming a suitable organ for the trial of many types of action which

asked for more elastic methods. Among these were mercantile cases, and others touching "contempt of the King" or acts of violence, where the incriminated parties had successfully evaded the writs of the King's Bench and but for the appeal to another tribunal would have escaped punishment. Ecclesiastical causes respecting the exercise of papal jurisdiction, of which the English Courts were properly jealous, long before the great Statutes of *Provisors* and *Præmunire* assigned their judgment to the Council, were in practice settled by them at these sessions with beneficent results, greatly to public satisfaction. In fact, all the evidence points to the conclusion that the Council sitting at the Exchequer exercised an equitable jurisdiction anterior to that developed in Chancery, of which it formed the model but enjoyed a much shorter life.

Writs of summons and arrest were here first used, and it was also a new feature of the Council's procedure to draw evidence from the direct examination of the defendant, the *inquisitional process* as it came to be called, which as used in Exchequer was quite as old as that congenial to Chancery, if applied in a somewhat different mode. Eventually, however, proceedings in the latter Court gained upon and finally superseded those before the Council in the Exchequer, though, as so often happens in the evolution of law and custom, a vestige of this primitive Court remains embalmed as it were in the famous Act of 31 Edward III (1357), which is rightfully considered as the creator of the Statutory Court of the Exchequer Chamber. "The Court thus constituted," says Professor Baldwin, "was none other than the historic 'Council at the Ex-

chequer,' which was assembled now for a certain specific purpose."<sup>1</sup>

In dealing with writs of error which came to it for determination, the Chancellor is given precedence, although the Treasurer was associated with him in preserving the authority of the Court, while the justices were to come before them and are treated in the light of assessors. Professor Baldwin proceeds :

"The special victory which the Exchequer gained by the statute lay in the fact that the judgments of the Court were sent back to the Exchequer for execution, . . . so that the revised judgments were placed upon the Exchequer Rolls as before,"

and in this form the Court survived for centuries, becoming indeed an essential feature of English jurisprudence and one of the most useful wheels in its machinery.

The identification of the Chancery with the Council was a principal feature of mediæval thought, till in the fifteenth century it reached a unified status as a separate Court of equitable jurisdiction in the widest sense of the term. In describing its earliest functions Maitland<sup>2</sup> says : "It was a great secretarial bureau, a Home Office, a Foreign Office, and a Ministry of Justice," and in each of these spheres of duty it represented one aspect of the Council, figuring as an executive department which, as the same author elsewhere observes, "does nearly all the King's writing for him, whether such writing concerns foreign affairs or the government of England."

<sup>1</sup> *The King's Council*, p. 234.

<sup>2</sup> *Hist. of English Law* (Cambridge, 1898), i. 193.

The changes time wrought are thus to be traced from the concentration of powers in one body to their gradual distribution over many, each containing a principle of growth tending to separation of authority, while preserving more than one clue to a common origin and an identic tradition drawn from the august parentage of the Norman *Curia Regis*.

The consultative prestige of the Chancery lay in the glamour that from the earliest times gathered round the person of the Chancellor, who to this day is the highest secular functionary apart from the Crown itself, a unique glory and distinction, which resides in his character as the Keeper of the King's Conscience. In a writ under the Privy Seal, Edward I refers a petition to the Council for the consideration of the Chancellor *de jure et gratia*—qualities, as we fondly believe, engrained in the traditional virtues of English jurisprudence.

Justice had its origin in the King's Council, and the Chancellor as its most exalted member became the depositary of the abstract idea as it emanated from the fountain-head, which was the King; "*veniant partes coram cancellario . . . et fiat eis justitia*" is the emphatic direction of Edward I, the English Justinian, and the Court never lost its original impetus and inspiration. Legislation took up the impulse and proceeded from time to time to assign subjects to the jurisdiction of the Chancellor and the Council; thus in connexion with the Statute of Præmunire, already mentioned, it was therein enacted that persons suing in a foreign Court for matters cognizable in the King's Court "should be made to appear before the King and his Council



or in his chancery," the process in either case being deemed to be on a par in certainty and importance. The extension of the Chancery's claims to consideration was undoubtedly due to its reputation for impartiality and efficiency, but it was never permitted to be forgotten with all its growing popularity that the Court which the Chancellor was entrusted to assemble for the trial of petitions to the King was in truth and substance the King's Council, not excluding "the Lords and those skilled in the law." Cases, indeed, were explicitly declared to be heard "before the Chancellor and others of the Council," with such fidelity did popular usage cling to old forms and customary phraseology. It was not long, however, before suitors, probably in the belief that the Chancellor was the head of the Council, began to address their petitions to "the Chancellor and the Council," to be superseded during the reign of Richard II—a revolutionary period in more senses than one—by the brief direction "*au chancellor du Roi*." This was done, moreover, with the complete acquiescence of the King and Parliament.

An advanced stage in the development of the change was reached about 1390, when a remarkably concise petition was addressed to the Chancellor, William of Wykeham, by certain foreign merchants complaining of the seizure of their goods at sea; but even here, upon the endorsement of the petition, the form of ancient usage was preserved, in that the hearing is stated to have been before the Council—*per idem consilium consideratum fuit et decretum*—and damages ordered to the plaintiffs.

It may here be expedient to cite Dicey, who thus



pertinently summarizes the motives that led to the change :

“ It may readily be supposed that the pressure of other business and a distaste for the niceties of legal discussion made the Council glad first to refer matters of law to the Chancellor, and next to leave them entirely to his decision.”

Still, the steps by which the change was accomplished were, as we have seen, very slow ; during the early part of the fifteenth century petitions to the King and Parliament vastly preponderated, and in his judicial capacity the Sovereign was still regarded as the head of the Council ; but by the time of Henry VI the Court consisted of the Chancellor, the Master of the Rolls, two judges, and four “ masters ” sitting on the bench, and this constitution held its place henceforth as the more or less permanent organ of Chancery practice. Members of the Council, apparently as a matter of form or to assert an obsolete right, still continued to put in an occasional appearance.

At the stage reached it remains to be asked whether any other cause than the gradual working of needful forces contributed to the separate growth of the Chancery, and for that we must look to some less obvious conciliar action beyond that which appears on the surface, for, as Dicey says, “ there is little reason to suppose that persons brought before the Council and those summoned to the presence of the Chancellor came before an essentially different Court.” The root occasion of the tendency to change is attributed by Professor Baldwin to the extended use of the Privy Seal and to the more

simple and expeditious methods of this office. Its private and personal significance had long fallen into disuse, and it had now become part of the State machinery, like any other legal process. Its work was done more cheaply and attended by less formality, besides having the advantage of being entirely untainted by Parliamentary control. With these merits, aided by its greater security and expedition, it was not only more serviceable to Government departments in the ordinary course of administrative action, but had greater attractions for the everyday suitor, when it could be employed with safety. In process of time it became the sole organ of conciliar judicial activity, and its writs of summons were issued under the authority of the Council. The first to hold the office of Clerk of the Council was an official of the Privy Seal, as were several of his successors. It received a still greater stimulus from a man of whom Froissart says, "Everything was done by him and nothing without him," when under the direction of William of Wykeham, once Keeper of the Privy Seal and now Chancellor, it was definitely provided by ordinance that all business "of great charge" should be determined in the presence of the Chancellor and certain others of suitable importance, whereas "all bills of the people of *less charge*" might be treated before the Keeper of the Privy Seal together with those of the Council who were present at the time. In this ordinance a prototype of the later Court of Requests has been discovered by some authorities of no mean value. One characteristic of its growth was the jealousy of Parliament excited under the belief that it concealed a process of usurpation which might in the long run

be injurious to the power and prestige of the Great Council of the nation, at which status Parliament had by this time arrived.

“Under these conditions,” says Professor Baldwin,<sup>1</sup> “we may speak of the Council and the Chancery not as two distinct bodies of authority, but as the same body in two diverging methods of operation. . . . With the Government,” he proceeds, “there was the alternative between the greater secrecy and despatch of the one procedure and the greater formality and security of the other. . . . To the suitor, on the other hand, there was offered a measure of choice whether he would have his case determined more expeditiously and at less cost by the summary procedure of the Privy Seal, or at greater expense but with more security in the Chancery.”

It has to be borne in mind, while estimating the growth and tendency of jurisdiction with the forces shaping it, that the King's Council enjoyed a widely distributed and indefinite sphere of action long before any Courts with specific functions attaching to them arose, and in the development of such Courts, so far traced, there is much that is indeterminate and obscure. Records, too, are frequently uncertain and as a rule inadequate. In this respect the Chancery is the richest, dealing, as we have seen, with the matters of greatest importance, and because in primitive times, experience not having hardened to usage, there was often no relief obtainable at Common Law and litigants had no choice but to invoke a Court of larger ambit and a more elastic procedure, not to speak of the prestige it had

<sup>1</sup> *The King's Council*, p. 261.

naturally acquired by the presidency of the foremost subject in the realm.

It was long, however, before much precision could be used in distinguishing the cases that were in practice allotted to the Council or Chancery, and it was only with the coming of Edward I, as might perhaps have been looked for, that some approach to definition seems practicable. It is far from being the case, as some have supposed, that the Council went out of its way to attract litigants from more suitable Courts ; the real facts were that it accepted them under pressure in order to meet their wishes and spread a wholesome respect for law throughout the community. The problem offered by crimes of violence presented exceptional difficulty, as they were mainly the work of powerful men with armed bands at their disposal, or of those who, having obtained the judgment of a Court, proceeded to enforce it on their own responsibility by armed interference—a practice which it required all the vigilance of a great law-giver like Edward I to arrest or control.

During the turbulent days of Richard II cases of this character were constantly referred to the Council, and during the long minority of Henry VI there is mention of a special file of “ riot bills ” that were so remitted in a single session of Parliament. Cases of gross fraud were not overlooked, and such as affected the rights of the Crown naturally fell into the same category, while maritime and mercantile suits by virtue of their extra-territoriality were also deemed, in the opinion of the age, to demand special treatment over and above that which could be afforded by the ordinary Courts. Where foreigners were concerned, as it was charitably



supposed that they could not be expected to be familiar with the laws of England, one Chancellor laid down "that they ought to sue here, where the matter would be determined according to the *law of nature* in the Chancery."

These became of such formidable number under Edward III that neither Council nor Chancery could cope with them, whence sprang the germ of a new Court into transitory use by the delegation of a part of the business to a sort of Admiralty tribunal described at the time as a hearing before the *Admiral* and others of the Council, the first appearance of the term in the evolution of constitutional practice. It does not seem to have established a name for competence, as for the present this class of case was largely left in the hands of the older Courts until the reign of Henry VIII, which saw the foundation of a rigorous and effective court of maritime jurisdiction, an instance of the fertility of the Tudor régime in providing for the development of the navy in directions commensurate with its needs. With the fifteenth century cases of heresy and witchcraft, pointing to the threatened ferment on the religious horizon, seem to have grown more frequent, and these were to a large extent dealt with by the King in Council.

Though, as we have seen, both King and Parliament had contributed to sending petitions in all these categories to the Council or Chancery, there gradually grew up in Parliament, as the divergency of these Courts from the Common Law in practice became more clear, a desire, of which both Lords and Commons partook, to restrain its exercise and to protect the other from encroachment.



The alleged tendency of the Council to make its own law and give currency to decisions of a summary nature was the source of much restrictive legislation without in effect limiting the powers of the Council to any large extent. It is true a statute restraining the Council from dealing with cases involving a man's freehold was accepted by the King, and the Council's care to return such petitions to the Common Law Courts had much to say towards the removal of discontent, while the sensitiveness of the public conscience in relation to matters of life and limb was so far respected that without legislation curtailing their powers to this degree the Council, as a rule, hesitated to inflict such penalties. Parliament, moreover, did not fail to recognize the urgency of summary process in certain cases by consenting to reservations, so worded as not to impair to any great extent the powers of the Council.

The dealing with petitions, of which from the time of Edward I there were several hundred every year, was one of the most arduous parts of the work of both Parliament and the Council, and grew to an extent that threatened to absorb the time of each to the injury of graver public interests, and this no doubt led to the devolution of many of them on the Chancery, although it did not prevent the accumulation of heavy arrears. In these conditions it is curious to note that the practice grew up of bestowing special care upon the form of the petition, as as to simplify the hearing and secure a prompt reply. Recourse, too, was had to directing the complaint to some great magnate, invoking his influence with the Council in aid of the petitioner's prayer.

Informations affecting private individuals were numerous, and these, often prompted by private malice, required very careful handling by the Council, if the real motive was to be brought to light. At the same time, in spite of the abuses to which the practice was liable, the Council as a rule vindicated its character for thorough inquiry and sound decision. Such uses of the Council also tended to good government by the powerful restraint the extent of its jurisdiction had upon potential misdemeanants. Writs of summons and arrest were less productive of hardship from the difficulties found in making either process effective. These writs, however, had a peculiar attraction for a suitor, and it was against them that the opposition of Parliament was centred; but under stress of Jack Cade's rebellion it agreed temporarily to legitimize their use for a period of seven years, provided that they were confined to cases of riot. Commissions of arrest were still more rarely used and were then commonly entrusted to six or more competent persons "to have-before the King and Council to answer what shall be charged against him and to abide their order." A society so protected cannot be deemed wanting in provisions for the safety of the subject, and gives the impression of unremitting vigilance in the maintenance of order. The parties summoned under this process were usually allowed ten days or a fortnight in which to appear before the Council, and though the hearing was often delayed and in certain cases given for trial to a commission or some other court appointed thereto, the desire to do justice seems to have been the object generally attained.

In further relation to the forms of the process, we have evidence that in the last resort the power of the Council made itself felt by recourse to inquisitorial examination, a method mainly in use for criminal investigation and, as its name implies, borrowed from the practice of the ecclesiastical Courts in cases of heresy, both parties at times being subject to the obligation of an oath, but on all occasions the defendant ; and as the person accused was neither informed of the charges against him nor allowed the benefit of counsel, he was obviously at a serious disadvantage and liable on examination to give himself away : from this situation it was but a short step to torture, though it is to the credit of the Council that they were habitually slow to lay hands on life or limb, as in the case of Roger Bolingbroke (when prosecuted in 1441 with the Duchess of Gloucester for witchcraft), who was brought from the Tower and exhibited before the people with the instruments of suffering hung about him and then removed for examination by the Lords of the Council.

In the event of cases of inordinate length coming before the Council it was the practice to devolve their hearing upon committees, in which a small number of lay and clerical persons took part, assisted by one or more of the justices ; but these committees were not empowered to deliver a final judgment, which was reserved for the Council itself. Moreover, it was in direct conformity with statute that the Lords of the Council should not determine legal points without the help of the justices. The need of some reference to the King was also implied anterior to the final decision, thus recalling

one of the earliest features of the *Curia Regis* that a judgment did not become legally valid until it had been confirmed by the King. The Council themselves seemed to feel the importance of such a provision, as on more than one occasion they expressed the opinion that in no case could a final judgment be given until the King was consulted. This principle of conduct was specially suited to any novel construction or application of the law, which, looking to the habit of the Court to deal equitably with the causes submitted to them, established on a firm basis the rule providing for some form of submission to the King.

It will be seen that under the complex system of checks and balances a very genuine effort was made to secure the administration of justice on a stable and generous scale, to which the flexibility of practice in Chancery and Council powerfully contributed. They were in fact Courts of summary procedure acting on principles of simplicity and expedition, which led to and explained their popularity with suitors, in contrast to the notorious and burdensome delays of the Common Law. For the most part they justified their reputation, for, as Professor Baldwin observes, "while the Council was not always easy of access, its cases when once taken up were terminated in the briefest possible time." Many petitions, however, it must be feared, were simply neglected as matters of no interest and never heard of again, which in process of time became a very practical reason for the preference given to the Chancery, with a result after some years' experience that so overwhelmed the tribunal as to become in its turn a source of public complaint.



The troubles of the fifteenth century brought to light the inefficiency of the Council as a court of law ; in some directions this arose from the inadequacy of its penalties and punishments, or perhaps it would be more correct to say their inequality. In dealing with Lords and men of knightly status, timidity and indulgence were too often displayed and its severity reserved for the humble. The inability of the ruling power to free itself from these delinquencies lay in the root mischief that the Government itself was bound up in the evils that needed correction—a state of things which the coming of the Tudors did much to remedy, owing, in spite of all their arbitrariness and violence, to the instinctive sense they undoubtedly had of the needs of a community emerging from two centuries of storm and stress.

In considering the relations of the Council with Parliament, the latter term must be understood to cover the section of it which, commencing as an integral part of the *Magnum Concilium*, ultimately emerged as the House of Lords. In the reign of Edward I, which marks the real commencement of the Commons House of Parliament, the sworn Council in permanent session became for the time being merged in the larger body, and it was only with very gradual steps that by a process of elimination and selection the ultimate status of each of its constituent parts was determined. For the moment the Council and Parliament were one and the same. The term “council” had no settled interpretation and might be used indifferently, for, as Maitland significantly observes, the word *parliamentum* implies “rather an act than a body of



persons," a body, in short, that talks. It is but slowly that the word is applied to colloquies of a particular kind, namely, those that the King has with the estates of his realm, for as early as the reign of Henry III the Barons were asked to attend *coram nobis et consilio nostro in parlamento nostro*. Parliament therefore at the outset was the ill-defined collection of three estates, the nobles and the commons and a certain number of justices and officials "with others of the Council," although there were of course many of the first category contained in the last named, their status as Peers being superior to that of councillors—a fact which, as Professor Baldwin remarks, "goes far to explain why the King's small Council has so little distinctness in Parliament and why it was so readily merged in the larger body."<sup>1</sup> Thus it was a common feature of judicial procedure for the justices to postpone hearings until the dignity of the Court was enhanced by the presence of the magnates in Parliament, and with that body not in session the Council and the Courts resumed their usual atmosphere. A prorogation took the form of the dismissal of the larger section of the assembly with the King's thanks for their attendance, but those who were of the Council could not go away without the King's particular authority.

"The Council in Parliament" was not restricted to the sworn members of the body, but rather implied the presence of all those who were potentially of the status attaching to its functions, though the groups indicated still lacked definition. It would seem on the whole that the connotation of the term

<sup>1</sup> Baldwin, *The King's Council*, p. 309.

lay in the suggestion of a sort of macrocosm of the elements contained in the smaller and more constant body, in which the representation of the different groups reached its minimum. The group of professional persons covered various degrees of "learned men," many of them members of the Council, of whom Edward I took care to have plenty in Parliament, but without the right to a summons enjoyed by the Barons, whose special duty lay in the legal sphere, whether judicial or legislative. Thus in the disposal of the lands of the Templars it was, by the opinion of this element in the Council, deemed inexpedient that they should go to the Lords of whom they were held, and finally settled by Parliament that they should be given to the Hospitallers on the principle of propinquity, a judgment which enhances the pride we may properly take in mediæval justice, as taught in the school of the greatest of the Plantagenets.

The work of legislation, which was in the main judicial interpretation in legislative form, was happily in the hands of the King's professional councillors, as shown by the very shape of the statutes, like that of Acton Burnell, 1283, which was declared to have been made by the King *et par sun consail a sun parlement*.

Legislation in the fourteenth century came to have a different emphasis by the relegation of the Council to the background, though they still prepared measures for the consideration of Parliament and in this capacity acted more like the Cabinet of modern times. It must, however, be said that the legislative activity conspicuous under Edward I slackened in succeeding years, so that, according

to one authority, "there ceased, with a few noteworthy exceptions in the fourteenth century, to be any important law-making until the Tudor period."

From the time of Edward I, who, as we have seen, procured their introduction into Parliament, the position of the judges in that assembly was gradually lowered in importance even in connexion with judicial business, as can be seen by the references to them in legal and diplomatic instruments, and by the end of the century they are clearly deemed to be no more than advisers to the Lords and prelates who took their place in the discharge of various functions. Thus the "Council in Parliament," when mentioned, came to mean the House of Lords itself, wherein a few of the law officers remained for certain subordinate work, whereas the "Council out of Parliament," as it sometimes came to be called, developed powers and methods of a very different character. Perhaps the most important of these was the claim to legislation "either apart from or supplementary to Acts of Parliament." This power had been exercised in very early times when there was no disposition to challenge its validity. The first doubts on the subject appear to have arisen when the justices of Edward II entertained scruples on the point; for on the accession of his son, as a form of protest against the "evil counsellors" who had conducted the late King to his doom, a certain charter covering a series of mercantile ordinances was annulled. Subsequent legislation imposing positive restrictions upon this form of conciliar activity is frequent. In 1348 it was enacted that no "tallage or charge by way of loan" should be levied by the Privy Council without the consent of Parliament.

It was, however, a power usefully held in reserve, as in the following year, when no Parliament or Great Council could be assembled because of the Black Death, the famous Ordinance of Labourers was passed by a smaller Council, the effectiveness of which is proved by the fact that although the Statute of Labourers with different provisions followed two years later, it was the ordinance and not the statute which the Courts continued to enforce. In the same reign, as stated by Professor Baldwin, the Chancellor and the Treasurer, *with the advice of the King's Council*, were permitted to defer the term of the passage of wool or stop the importation of wine—an early illustration of the power claimed by the Privy Council throughout its history in times of emergency to act independently in such matters, of which the Orders in Council in reply to Napoleon's Milan and Berlin decrees are the most memorable examples. Instances of a cognate character are to be found during the late war by virtue of what was stated in Parliament to be a power inherent in the Council.

In reply to Captain Wedgwood Benn, who asked the President of the Board of Trade "if he will say under what statutory authority the Privy Council acts in granting licences for export," it was stated :

"I am advised that there is no statutory authority, but that the power to grant licences for export has been exercised by the Privy Council in time of war at least as far back as the eighteenth century as one of the powers inherent in the Privy Council. I may add that the issue of licences for export is expressly recognized in Section IV of the Customs (War Powers) Act 1915, Chapter XXXI."



## CHAPTER V

### CONCILIAR MACHINERY (*continued*)

THE Parliaments of Richard II are full of efforts to have the powers of the Privy Council regularized in the matter of legislation, but without effect, as the King habitually resorted to evasion, and the practice when applied to mere suspension became still more difficult to check. Indeed in this reign it drew from a chronicler the piteous complaint : " Of what use are the statutes made in Parliament ? The King and the Privy Council habitually alter and efface what has previously been established in Parliament, not merely by the commonalty, but even by the nobility."

The methods of the Council, astutely conceived, made interference still more difficult, for when the Rolls of Parliament, which had been extensively used by the Council, were confined to parliamentary purposes, that body had recourse to the machinery of the Privy Seal and so found a mode of action clearly distinct from the legislature, for while it was served by the Secretariat of the Chancery, the King's Council in utilizing the rival office of the Privy Seal increased the jealousy excited, as without the obligation to enroll their proceedings the Acts of the Council were not subject to scrutiny and so evaded publicity.

It has been noticed that during the Middle Ages Parliament, like the Privy Council, was mainly



concerned with jurisdiction<sup>1</sup> and was so regarded, its functions as a legislative body having largely fallen into disuse, in which connexion it is interesting to find a Frenchman at the time speaking of the English Parliament and the *parlement* of Paris as if they were in all respects similar bodies. The latter was, of course, an exclusively judicial institution and has never been anything else.

The union of Parliament and the Council was at certain periods so close that no distinction was in effect made between petitions dealt with by one or the other. Public effort was indeed made to reduce the burden to the Council, whether from jealousy or the wish to save their time by limiting them to matters of importance, while charging officials with the duty of their primary consideration. Later, relief was sought by making the Chancellor or other minister the vehicle for reaching the King and Council. A further plan was tried by the commission of "receivers," who should make the first essay in looking over petitions for the object of deciding upon their treatment. This plan does not seem to have been a success, as it was replaced by the choice of "hearers," a committee divided into groups which should deal with them geographically, the receivers still being retained to classify them. Hearers differed from the Council only in so far as they were made the subject of very careful selection, it being "a mark of distinction among the Lords to be named in that way"; but these having no authority outside the session, the Council was still heavily weighted with petitions at other times, as complainants were encouraged to air their grievances more

<sup>1</sup> Baldwin, *The King's Council*, p. 224.

freely, "any man aggrieved by the King or his officers" being promised a remedy in this wise. Cases involving great difficulty might be docketed on reference to the Lords *coram magno consilio*. One really touching effort was made to allot petitions to the proper quarter, the Commons being insistent that "the law of the land" should not be changed or suspended on the petition of any private person and should be finally discussed only in Parliament.

The discussion of these was often interrupted by the call of the King to lay them aside in order to approach "the perils and damages of the realm," with the result that scores of petitions both public and private were "from the brevity of time" often hung up indefinitely and rarely heard of again. The Lords made heroic attempts to deal with the situation, for they fully recognized the value to them of keeping a firm hold on the jurisdiction it implied; but the volume of work was continually growing too large for the channels provided by the Constitution for its disposal, and though there was no wish to deprive the Council of its functions, a significant hint was conveyed in the words "right could be better done in Parliament than elsewhere."

Rather than entrust the task to the Council, they multiplied the number of committees, but this expedient was deftly turned against them by Richard II when he induced his last Parliament to compromise their position by the appointment of a committee of Lords, no doubt many of them members of the Council, "to answer all petitions at their discretion," a procedure which was rudely cancelled after his dethronement. Parliament, how-

ever, in the next reign took the inevitable step of turning over its undealt-with petitions to the Council. The block in business never ceased to grow, as is reflected in the complaints of those who suffered: the average suitor cared little for the rivalries of the bodies that contended for his favours; his object was to get his petition heard and his grievance remedied as soon as possible. Between several avenues of choice he could always learn, from his own experience or that of others, how to calculate his chances of success or failure, and the result had a curious effect in its reaction upon the modes of hearing.

Hence a great variety in the forms and elaboration of the petitions sprang up, which sometimes even took the shape of appealing to different authorities in the hope, sometimes realized, that if it failed with one it might succeed with another, no strict co-ordination appearing to subsist between them, and there were obvious attempts to coax the Courts with unctuous and flattering phrases. Others by their irregularity and hesitancy reflected the doubt and anxiety of the petitioner, whether for instance he should address himself to the Council *and* the Lords of Parliament or should include the King, the Council, and the Lords for greater surety. It is not a little singular that Norman French is the vehicle of expression most constantly used, bearing witness to the outstanding legacy of precision and clarity bequeathed by centuries of contact. Petitions were sometimes addressed to the Commons ostensibly for transmission to the Lords, or more frequently for the sake of their mediation as a means of access to the Lords or the King and his Council. It was this

same need of mediation that led to the approach of both the House of Lords and the Council by appeal to the Chancellor or some other Peer of conspicuous rank and position such as John of Gaunt or Humphrey Duke of Gloucester ; a petition to the former opens thus : " A tres-reverent et tres-honourable Seigneur le Roi de Chastill et Duc de Lancaster et a tres-sage conseil notre Seigneur le Roi." Another proceeds : " A tres-noble et puissant Seigneur le Roi Chastille et Leon et autres Seigneurs de parlement." Efforts of literary embellishment were not wanting in certain classes of petitions. " In cases for instance of maintenance," says Professor Baldwin, " the bands of armed men, the weapons, assaults, riots, intimidations, and other acts of violence are set forth with far more vividness than is found in the literary productions " of the age.

The exercise of parliamentary power in the field of jurisprudence had an immediate effect in limiting the range of the Council as a court of law, as the claims of the House of Lords to be heard in the matter proved more potent than the complaints of the Common Law, and there is indubitable evidence that the Commons viewed the interposition of the Lords with more favour than was ever extended to the pretensions of the Council. It is not only that from the time the Council became known for its summary writs and inquisitional examinations the efforts of Parliament were thrown into the scale on behalf of the Common Law, but they became a formidable rival in settling the point whether final appeals on error should go to the Council or to the Lords.

A decisive case was heard in the later years of



Edward III, when on writ of error a case was removed from the Court of Common Pleas and taken before the Council, where the judgment was reversed "by the Chancellor before the Council;" but the justices paid no regard to the reversal on the ground that "it was not the place where judgment could be reversed," the inference being that it should have gone to the King's Bench or to the House of Lords.

The Lords, however, were so overwhelmed with work that they contented themselves with the plea that the Chancellor himself had no such jurisdiction but could only act by the authority of Parliament.

In regard to cases of violence there was an ancient opinion that they belonged in a special sense to the Council, but petitions from the reign of Richard II to that of Henry VI indicate that they were addressed to the Lords as often as to the Council, the difference lying not in the nature of the case but in the method of treatment, wherein the Council had made its first large departure from the Common Law by the adoption of more stringent expedients for eliciting the truth, the Lords having only in extreme cases adopted the extra-legal practice of the Council. There were also occasions on which appeals were made to Parliament, as a higher Court, on the ground of the incompetence or abuses of the Council. It was rare, however, to find in either Court the offence of a powerful man actually subjected to punishment.

With the close of the Lancastrian dynasty it was evident that the House of Lords as a judicial body had bitten off more than it could chew, as the lay obligations of its members and their non-attendance owing to distant calls upon their time led to the



recognition that the new departure had come to nothing—"the trial and the failure of a great constitutional experiment," as it has been called.

The House of Lords under the conservative impulse of the magnates had undertaken the defence of the Common Law and kept its own procedure consistent with it, but it was henceforth accepted that the Council might properly exercise a wide if indeterminate jurisdiction external to the Common Law. The ultimate adjustment was not reached when the Wars of the Roses arrested all constitutional evolution.

The foregoing pages perhaps contribute more enlightenment than any previous part of this record to the story of the mediæval Council, its practice, powers, and pretensions. Like any other human institution it was guilty of many errors, took many false steps, and was often deluded by vain hopes, but, taking it all in all, there may be justly claimed on its behalf that it pursued no ignoble aims and was in the main guided by a profound sense of public needs and a desire to satisfy them even at its own cost. The salient feature of its dogmatic authority was the instinct to emancipate the people from a too slavish adherence to outworn forms and to pour fresh blood into the ancient vehicles of administration. Much is left obscure, but the bare facts approached sympathetically often furnish a very true index to the evocation of thought and feeling. It is pleasant to rummage among the relics of the past, and still more to find in some of the old chroniclers not only a passion for imparting knowledge, but also a soul alive to the magic of sounds.

The form of the councillors' oath has some significance in illustration of the gradual divergence of their functions from those of the officers, which was certainly complete by the middle of the fourteenth century. The oath taken a century earlier is obviously the parent of the present document, whole clauses of which are almost textual repetitions of the primitive use, in those days imposed on all sorts of people responsible to the State for the discharge of their duties. As the Council incurred a good deal of suspicion in the days of Richard II and Henry VI, when long minorities had invited its independence of authority, more exacting forms of obligation came to be imposed ; thus we are told that in the reign of Henry VI the oath was put " under correction " and directly prescribed by Parliament ; the form enjoined again largely foreshadowed the terms in use to-day in respect of faithful counsel and the obligation of secrecy, the final clause, " And generally ye shall observe kepe and do alle that a gode and trewe counsailler oweth to do," being substantially the same.

The council-chamber as soon as it was localized was obviously that later styled " the Star Chamber," though first described " the Council Chamber next to the receipt of the Exchequer." Some wild explanations have been offered of the later name, one pundit suggesting it to have been " according to the nature of the judges thereof," in their likeness, as he discovered, to stars of the firmament ; while as late as Blackstone it was explained upon his authority to indicate its use as the depository of certain Jewish bonds called *starra* ; but both Latin and French designations, *Camera stellata* and

*Chambre estoilée*, respectively give the much more obvious and simple reason that the room had a ceiling adorned with stars. "The home of the Council," as it came to be called, was further emphasized in an ordinance of 1426, which provided "that no Bill be sped but in the place ordained for the Council."

The costs of the Council, besides covering expense of messengers, wages, and robes of councillors, were mainly incurred by refreshments, often of a substantial kind; these became a special indulgence of the Court under Henry VIII, the great feast of the week taking place on Friday, possibly to mark departure from Catholic usage.

The first appointed as Clerk of the Council was, as already stated, one John Prophet, later Dean of Hereford, 1390, subsequent investigation having confirmed the inference of Sir Harris Nicolas in this respect. The Head of the Council was not determined till long afterwards, although at different times eminent persons such as Archbishop Stratford and the Chancellor William of Wykeham, respectively described as *consilarius principalis* and *capitalis secreti consilii et gubernator magni consilii*, enjoyed a titular primacy, while Royal dukes in the persons of Bedford, Gloucester, and finally the Duke of York were granted the first-named title, the first two during the minority and the last in the closing years of Henry VI. A similar designation was borne by a lesser but still famous man, Sir John Fortescue, who says, perhaps in reference to himself, there must be "a head or a chief to rule the Council chosen by the King, having the office at the King's pleasure, who may thus be called *capitalis consilarius*."

The mediæval Council in its early stages was very chary in bequeathing any account of its proceedings to future generations ; a point upon which Professor Dicey makes the sage remark : " The conjecture is therefore natural that the Council's acts were first accurately recorded when its existence as a separate institution was for the first time distinctly recognized," a date generally fixed towards the end of the fourteenth century, though there is much collateral information affecting previous periods brought under review, by the efforts of private persons such as that " cunningly scraped together " by Sir Richard Cotton. The Council was never a court of record, i.e. " that which could be appealed on error," and therefore only moved to register its acts for its own convenience. The familiar process was through petition and answer, the point of divergence between two forms of petitions being discernible in the nature of the response *per consilium regis* or *per consilium in parlamento*, the decision being inscribed on the petition in the briefest possible endorsement. This was not the only method, as " bills," it is said, " were endorsed or made by the Council," indicating an initiative which was most frequently taken in connexion with the affairs of Scotland and Gascony.

An interesting feature are such entries as throw light upon the points of contact between the Crown and the Council, from which it appears that outside the rule that the rights of the former were not to be touched without the King's assent, it would seem that the Council showed little willingness to incur responsibility without his formal approval. Letters between the two are frequent, sometimes



they passed daily, assent being given in the formula *il plait au roi*. Important references were sent by express messenger, and on an emergency arising out of a draft of letters under the Great Seal, two sets, in one of which a certain clause was omitted, were sent by the Council at Westminster to the King at Windsor, a transaction with quite a modern flavour and none the less so because the business related to Ireland, history thus anticipating itself at a distance of five hundred years.

While Edward III was engaged in the French war a long controversy was carried on between King and Council, involving a dispute attaching to the latter's alleged neglect in forwarding money and supplies, which generated a good deal of heat in the Council's repudiation of the charge, Edward's final suggestion being exposed as utterly impracticable. "Seldom," says Professor Baldwin, "do we find a document which reveals so much of the interplay between motives and feelings."

In some cases the proceedings of the Council were made effectual by direct letters from the King, but more frequently their acts were taken as warrants for orders under the Great Seal or the Privy Seal, the latter tending to become the more usual form. There was no fixed practice of enrolment, the performance of the injunction being accepted as enough. A step forward was taken under Richard II not only by the appointment, as we have seen, of the Clerk, but by the instruction given him to regard the names of the members present in every endorsement or memorandum, and from the same reign "Bills of the Privy Council" began to bear the Royal sign-manual, which was followed by the compilation of



a journal or register, obviously for the purpose of reference ; a journal of this kind, bearing the date 1392-3 and consisting of ten good-sized membranes stoutly sewn together at the top, is still extant and clearly the work of John Prophet, whose "vigorous handwriting" is recognizable throughout, the object being to abridge the notes taken at the time and summarize the proceedings from day to day. Thirty-four sittings are noted, sometimes two in a day with an interval for "eating." The usual number present was from six to twelve ; sometimes it falls to three or four ; the officers and knights proved most consistent in this respect, while the attendance of the Lords was very irregular. "So far as is known," says Professor Baldwin, "no other attempt to compile a register was made until 1421,"<sup>1</sup> when a roll appeared known as the "Book of the Council," which enjoyed a precarious existence for some years. Mention is made of some such record in 1455 during the supremacy of the Duke of York, when it was proclaimed that his oath of allegiance to Henry should be ". . . written and incorporated in the Book of the Council there to remain among other acts and ordinances," but general opinion favours the belief that it was a revival of the old book, which, like many other enterprises of that year, came to nothing. At any rate, nothing more was heard of such a book, in spite of Sir John Fortescue's tribute to its value, until the reign of Henry VIII.

A few more aspects of conciliar activity and enterprise are worth attention, not only for their bearing on any constitutional problem, but for the light thrown on personal relations and the harmony of

<sup>1</sup> *King's Council*, p. 391.

contrasts they disclose. Kings in great variety of character and capacity come and go, and Councils of equal divergencies in all their moods and tenses, while often subject to the haphazard strain of time and place, yet upon the whole they worked together on terms of mutual confidence and unwearied patience. The extent to which the King trusted the Council or was affected one way or another by their dispositions must always have depended in no small degree upon the interplay of personal feelings and factors. A weak, impulsive being like Edward II on one occasion had the confession drawn from him that there was insufficient council available, and again—an indication that his self-will was not always unshaken—"that the King should always give credence to his Council in all matters affecting the Government."

On the other hand, partly because of dynastic insecurity, and in no small measure owing to the ineffectiveness of the monarch whose reign occupies nearly two-thirds of the period, it became customary in Lancastrian times for the Council to assume powers of dictation and control which tended to overshadow every other source of constitutional authority. Moreover, in estimating the forces at work, we must always distinguish between the advisory section, which, in greater or lesser number, was present with the King, and the administrative and judicial division settled at Westminster with its gradual assumption of a lasting organic form.

The bearer of communication between the two was always a man of weight and learning, and he was often entrusted with the transmission of oral messages, too secret to be committed to paper,

which enhanced his importance and gave emphasis to the confidence he enjoyed. The attempt under Richard II to limit these "reporters" to the Chamberlain, the Steward of the Household, and the Keeper of the Privy Seal failed of effect, as the King persisted in the preference of men of his own choice; but in the ensuing reign opportunity was to impose on Henry IV the declaration "that a suitable person should be found to report to the King and to certify the Council of the will of the King," which was said to be expedient "not only for the advantage of the King but also for the sake of each person in the Council who wished to acquit himself loyally of his oath."

John Durward and after him John Norbury appear to have had the qualities desired. Ultimately the duty was allowed to fall into the hands of the Clerk of the Council, Adam Moleyns and Thomas Kent, two successive holders of the office, being accepted as peculiarly suitable for the task.

Certain occasions were also chosen for formal audience between King and Council, *in præsentia regis* being the phrase used to designate these ceremonial receptions. Thus we are informed, the King (Richard II) summoned the Council to his private chamber and commanded them to deliberate in his absence upon certain instruments about to be made, and on the renewal of the audience the Chancellor reported to His Majesty that the measure recommended did not seem to them expedient. The King tried to bend them to his will, only to draw from the Chancellor a still stronger reiteration of this objection which every member of the Council shared. Whereupon, it is said, the King "with an angry

look " departed to Kennington. The next day the Lords continued their deliberations and agreed, in spite of the King's displeasure, to adhere to their decision. Upon their making a journey to Kennington, where they were admitted after some delay to the Royal presence, His Majesty, who had thought better of his obstinacy, proposed certain amendments to his original proposition which some of the Council accepted and the rest withdrew their objections, so upon these lines the matter was settled, to the mutual satisfaction of the parties concerned. Other occasions of difficulty in obtaining access to the King's person led to the suggestion in certain articles designed for the improvement of the Government that the King should give adequate time for audiences with his Council whenever it wished to communicate with him.

The obligation to give " faithful counsel " sometimes led to a curious deadlock, as it is recorded of a certain Lord Beaumont in 1323 that he once stoutly refused to pronounce his opinion upon a critical question. There was always some reluctance to incur the risk of being charged with offering " evil counsel," but this person was considered all the more contumacious as he was not only a Peer of Parliament but had been sworn of the Council. He seems, however, to have escaped any serious consequences, although to enforce responsibility not only were councillors' names put on record, but they were sometimes asked to affix their signatures to the Bills submitted. There seems to have been a constant fear of being left in a minority, and it was therefore strongly felt that dissent should be avoided by every excuse available. No more heinous offence



could be committed than to reveal "matter debated of in council," in spite of which Sir John Fortescue, who must have known the truth of the case, declared that "no matter treated of in the Council could be kept secret," so inveterate was the habit of talking to servants and dependents.

Freedom from bribery was even more difficult to ensure, as the means employed were more subtle, reticence easier to maintain, and devices for dodging discovery accessible, that which we know as log-rolling being as common then as now. There was also a practice known as "brocage," which implied the maintenance of quarrels at a time when the intricacy of legal process gave ample opportunities of fraud, and persons in high position were suspected of employing agents known as "brocagers" to promote litigation before persons who had a pecuniary interest in the result. It was one of the charges made against several Lords under Richard II, and in 1406 Lord Lovell was very properly excused from being present in the Council, "since he claimed to be interested in certain pleas and so could not honestly serve."

Occurrences of the kind did much to undermine the credit of the Council, which was further impaired by the presence of its members in the retinue of great magnates like the Duke of Lancaster, a fact which seemed to suggest a double allegiance from which the public was bound to suffer. The support of such great persons was indeed in danger of becoming essential towards getting some classes of business through the Council, and in spite of a clear perception of the risks "there is no doubt," says Professor Baldwin, "that the Government

of Henry VI was materially weakened by the prevailing inclination to yield everything to the individual interests of the Lords and their adherents." Sir John Fortescue also calls emphatic attention to this growing evil in the transactions of the Council. Such tendencies were perhaps to a large extent inevitable, but a strong hand in the seat of government could no doubt have controlled the situation and possibly in some cases have guided personal alliances into useful channels. Some restraints were in fact introduced, such as the enactment in an ordinance of 1426 that "no man be of the King's Council but such as be barely of his Council," and later on, in 1437, that "none of the Council take a fee of any person except the King."

These inconveniences had, however, some set-off by the status given to a councillor, which was hardly inferior to that of a Peer of Parliament or member of the household, entitling him to a robe at the King's expense, as we find in the Statute of Liveries words including his councillors among the exceptions from its restraints and at least once the King refused to suffer one of his Council to be distrained. Special penalties, moreover, were attached to assaults upon their persons by an Act of 1433. The privilege of the Peers to send proxies to Parliament was sometimes assumed by members of the Council without special leave, and occasionally they went so far as to express their opinions on questions before it, without entailing upon themselves the trouble of attendance, a practice conceded without demur to great magnates like Cardinal Beaufort and Richard Duke of York.

The obligation to attend was treated seriously

by authority, particularly when the practice grew up of ordaining fixed seasons for the meeting of the Council coincidently with the sittings of the Courts. These were four in number with more or less regularity as the case might be, and councillors were duly admonished, in recognition of this concession to their convenience, to observe their duty to be present, with the further notice that only questions of emergency would be treated during the intervals, the ordinance on the subject running : " Out of term time nothing be sped in the Council but such things as for the good of the King and of his land asketh necessary . . . and may not be abiden unto the term time."

The regulation of a quorum presented much difficulty and there were various plans under trial at different times ; ultimately a fairly useful rule was accepted in the reign of Henry VI to the effect that " in all great matters that shall pass the Council all shall be present or else the majority, and that in other matters nothing shall be done except in the presence of six or at least four besides the Great Officers." The problem of attendance was further complicated by the presence of unsworn persons, who seem to have been there, not only for the assistance which in many cases professional men were able to give, but because they were called as witnesses on occasions of special solemnity or it appeared to the King and his advisers that the presence of extraordinary numbers lent dignity to ceremonial observances. Thus on the eve of the opening of Parliament the council-chamber was thronged with Peers, providing, as it does to-day, a stately ritual for the allurements of crowds.

These heterogeneous and unmethodical efforts to impress contemporary feeling are not without their interest or illumination, in so far as they serve the appeal from the drabness of the commonplace to the inspiration of an idealism not untouched with romance. Human character at all the stages of its growth has loved excess, if only as the most effectual protest against cheeseparing and poverty of spirit.

The crude dispositions of an immature State tend to retard progress, inasmuch as they slacken the development of a critical consciousness which gives the society that enjoys it both impetus and discrimination.

Out of the dust and futility of this last half-century of feudal sovereignty whose end was soaked in blood there was to spring a dynasty which, though stained by many crimes and seared by a great moral convulsion, was yet to produce a line of rulers with the instinct of administrators, an intuitive sense of the lessons to be drawn from the past, and no little discernment of public feeling.



## CHAPTER VI

### QUEEN ELIZABETH

UPON Elizabeth's accession, the Council met at Hatfield, whereupon the Queen addressed to them the memorable allocution :

“ I mean to direct all my actions by good advice and counsel . . . and to require of you all nothing more but faithful hearts in such service as from time to time shall be in your power towards the preservation of me and this Commonwealth, and for counsel and advice ” ;

and on Cecil's being sworn Secretary of State she added :

“ I give you this charge that you shall be of my Privy Council and content yourself to take pains for me and my realm. This judgment I have of you that you will not be corrupted with any manner of gifts and that you will be faithful to the State ; and that without respect to my private will, you will give me that counsel you think best : and if you shall know anything necessary to be declared unto me of secrecy, you shall show it to myself only, and assure yourself I will not fail to keep taciturnity therein.”

All Mary's councillors were then withdrawn or removed, Paget, the most moderate of them all, being allowed to plead infirmity and retire. Heath, Archbishop of York, in spite of the Queen's personal

good feeling for him, based upon the promptness with which by virtue of his position as Chancellor he had obtained the adhesion of Parliament to her succession in the early hours of the morning after Mary's death, was obliged to resign the office, to which Nicholas Bacon, Cecil's brother-in-law, was appointed.

Taking their relations as a whole, it will be found that, in spite of some outbursts of womanly impatience, Crown and Council preserved throughout the reign a mutual confidence and amity that realized to the full the promise of the Queen's accession. Indeed she listened to their representations and sometimes to their remonstrances, not only with attention, but in the latter case with a genuine effort at accommodation, no doubt emphasized by the conviction that in Burghley and later in his son she had the best advisers at the service of the State.

On the subject of the Queen's marriage the Protestant section of the Council was in favour of Arran (3rd Earl), son of the Scottish Regent, as a counter-candidate to Dudley, with whose ambitions the Queen showed every disposition to toy. Another step which was the subject of acrimonious debates in Council was the propriety of receiving the Papal Nuncio, to prevent which the dread authority of "*Præmunire*" was mooted and with success. Not content with being troubled about their own Queen's marriage, the proposed marriage of Mary Queen of Scots with Darnley, he being an English subject, was discussed with "long deliberation and argument," and declared "unmeet, unprofitable, directly prejudicial to the amity between the two

Queens, and perilous to the concord of the realm," and later they were prepared to advocate "vigorous measures" to the point of war to arrest the step, in all of which they no doubt had the sympathy of Elizabeth.

The question of assisting Mary's Protestant subjects was also matter of serious debate, as it could not be discussed without raising awkward suggestions of what in that case the Catholic Powers might not be invoked to do in support of their discontented co-religionists in England, a point that led to animated speculation in the deliberations of Council on September 24th, 1565.

Referring to the reception that might be given Mary, should she claim English hospitality, de Silva, Philip's envoy, told his master "the Queen had always shown herself favourable to the Queen of Scots and now takes her part with the Council"; that body was indeed rent with divisions and quite unable to pursue a stable course, which at one moment took the shape of a vote in favour of Mary's succession to the English throne, a step that Elizabeth did not hesitate to endorse, for in May 1570, at a great meeting of the Council called to consider the situation, the Queen terrified Cecil with the belief that she was going for it: by a declaration that she would meet the French King's wishes, let Cecil "and his brothers in Christ say what they will," a vigorous mode of expression not infrequent when challenged to impose her will upon a reluctant minister or Council, wherein the true daughter of Henry VIII revealed herself in a guise somewhat different from the diffident and docile neophyte of the accession.

It is not a little remarkable that Burghley and Philip II were to pass away the same year, when the struggle between the two interests they severally represented seemed still at its height, nor was it long before the waning forces of the great Queen led to the same end beneath a cloud of mortification and despondency, for which the conduct of her favourite Essex was largely responsible. His loudly voiced discontent with the Council's nominee in Ireland was met by their imposing, not perhaps without malice, the task upon him, which he had no choice but to accept. He soon found the difficulties of the situation too much for him, and believing that the Council were not treating him fairly—Raleigh and Cobham he mentions by name as disloyal—he returned home unexpectedly and appeared in the Queen's private rooms at Nonsuch, travel-stained and impetuous as ever. Elizabeth listened to him patiently, but his conduct had been too glaring to be overlooked. His defence was heard before the Council, who gave him every opportunity of stating his case, but he had practically no excuse to offer for the intrigues into which he had been inveigled by his own intemperance and the plausibility of those who had made him their dupe. On February 1st, 1600, he was summoned before the Council, but scenting danger and distracted by doubt, he precipitated an outbreak of his adherents in London, an act of treason which ended in a complete fiasco and left him without any plea of justification when with Southampton he was put upon his trial in Westminster Hall.

The following extract from the Acts of the Privy Council bears witness to the punctilious elaboration



with which the Council in those days took care to minute their proceedings, while painting in sombre colours the hopeless plight of Essex.

“ 16 February, 1600.

At Hause's House in Westminster.

Lord Keeper.	Lord Chamberlain.
Lord Admirall.	Mr. Secretary Cecill.

Edward Busshell	} were examined.
Sir Gilly Merryck	
and Henry Cuffe	

*Lord Essex to be searched.*

A letter to Sir John Peyton, Knight, Leiutennante of the Tower of London. Her Majesty is informed by the confession of divers of the confederates of the Earle of Essex that he hath as yet about him some paper in a blacke cover fitte for her Majesty's sight, and so much the rather because divers of his followers have confessed now that he told them when he should be found eyther dead or alive yt should appeare that he had bin betrayed by the cyttie. Now forasmuch as yt is conceaved that notwithstanding his deniall to me, the Lord Admirall, that he had it not, that yet doth remaine about him, wee are commaunded by her Majesty to require you in decent sorte to seeke for yt, but so assuredly, as that it may not be unfound yf it be there, but beeing recovered by you may be sent unto us for her Majesty to see. Wee thincke this fittest to be done in the morninge early before he be up yf this come time enough, but yf it do not then to take your owne time. And so," etc.

Robert Cecil has been charged with being the member of the Council most hostile to him and determined to work his ruin, but the evidence goes

to show that he acted with as much fairness and consideration as the impracticable temper of the victim permitted.

The last point of contact between the Queen and her Privy Council has an indescribable touch of pathos when, having disdained physic and almost invited torpor, she roused herself from the lethargy of death at a moment of returning consciousness and had the Councillors in attendance summoned to her bedside, telling them directly that she held the King of Scotland to be her lawful and deserving successor or designating him as such in a manner that could not be mistaken. One account says that on Cecil putting the question she said : " My throne is for a King, none other shall succeed me," and on Cecil's saying : " What King ? " she replied : " What other than my kinsman, the King of Scots ? " " In every great life," is Ranke's comment, " there comes a moment when the soul feels that it no longer lives in the present world and draws back from it."

It will be seen that the reign of Elizabeth is not memorable as an epoch of legislation or, it may be said, of administration outside one or two striking fields of activity. Dynastic problems, Royal marriages, plots and counterplots, the struggle between rival forms of religion culminating in the Spanish war and the defeat of the Armada, were its main preoccupations at home. Abroad it was the great age of exploration and naval expansion, and the prospect thus opened made its strongest appeal to the unfettered imagination of the people, nor is there reason to believe that in this sphere of strenuous action the Council was one whit behind the sovereign in the estimate of its infinite possibilities.

It was virtually a period of pause in the organized life of the commonwealth. The strong personal rule of the Tudors had cleared away the lumber and wreckage of mediævalism and left the field open for the innovating tendencies that were to emphasize the succeeding century. With Elizabeth's decease, it was much like the end of Victoria, a change from era to era.

The mainstay of national faith and character lies in the subconscious soul of the civilization which has given birth to them and still presides over the forces, actual or latent, moulding their ultimate destiny, and thus it is not, as all history attests, within the power of one generation to undo the work of its predecessors as it contributes its share to the secular process, to which, upon a comprehensive survey, all the agitations and mistakes of men are subservient. This indeed is the lesson which humanity in every stage of its ceaseless growth has for those that come after.

There may perhaps be allowed here some passing reflexions on the ambiguity of men's actions. If much that is incalculable is to be found in the lessons of history, the explanation surely lies in the mystery of human experience as it expresses itself in individual lives. So much is overlooked in applying the same standard of comparison to persons who have been powerfully impelled in different directions by what seems to the superficial observer to have been similar forces, whereas at the point of impact the reaction of the recipient is often wholly unlooked for. People whose circumstances and dispositions seem much the same may have, in the vivid vernacular of the French writing-table, *quelque chose dans le*

*ventre*, but on emergence it takes a variety of contradictory forms. What we have to do is to try to see men as they are and not through the disturbing medium of our sensibility with its ironic and illusory implications. What is the contrast of opposites but a step towards identity, and thus harmony is reached out of chaos ?

The Tudor epoch is, as we have seen, full of interest both from its actual achievement and its clear-sightedness in the testing of principles, in which connexion its chief actors seem to have anticipated the dogma of a later age that there is little room for rigid principle in public affairs, for, as Edmund Burke was never tired of repeating, every principle has to be determined by the conditions of its application to a given purpose. It was the most fruitful transitional period in English history, by virtue of what it discarded from the inheritance of the past and the boldness with which it grasped the needs of the hour. The crown of its glory is to be traced in the spacious days of Elizabeth. In dealing with the Council the exclusion, so far as possible, of the old nobles was the root objective of their policy. Instituted by Henry VII and confirmed by his son, who in his will regulating the Government during Edward's minority included only one Peer of twelve years' standing, the principle was, as shown, still maintained in the character of the Council indicated in the last year of his reign, while the success of Elizabeth's rule was largely due to the prominence she gave in her Council to the Cecils, Bacons, and Walsingham.

The reorganization of the judicial authority of the Council lay in the same direction, to draw support



to the Crown by virtue of its protection of the weak against the strong, and this contributed to implement the resources of the law generally. "Largely," says Mr. Trevelyan in his last brilliant study in English history, "through the wholesome fear that the [new] Star Chamber [as it was called] instilled into the minds of men, the ordinary Law Courts recovered their real independence and were no longer intimidated by sinister local influences," and he also attaches great value to "another expression of the judicial power of the Council analogous to that of the Star Chamber" found in the Prerogative Court of the Councils of Wales and the North, "districts," as he says, "where the feudal and military traditions of borderland would have made a mock of the unsupported Courts of Common Law." For a short time "the jurisdiction of the Prerogative Court and the King's ordinary Courts grew together in harmony under the shadow of the throne." Dissidences, however, at length worked their way towards the disturbance of this concord, and abuses, fostered by the practice of the Privy Council, threatened the safety of the subject, a state of things which under the ensuing dynasty swelled the causes of ultimate war between King and Parliament; but this fact must not be allowed to impair the value of the great part these Courts had played in Tudor times, which "was neither unpopular nor unnecessary."

Among the features of Elizabeth's administration in local affairs was the enormous growth in the potential activity of the justices of the peace, who played a dominant part in the life of the county, where they were the sole representatives of law and

order and the leading authority in all matters that touched local needs, whether it was the trial of small offences, the search for malefactors, the licensing of alehouses, the arrest of criminals, the maintenance of roads, bridges, and prisons, the regulation of wages and prices, and, what was more important than all, the enforcement of the new poor-law, perhaps in its effects and the duration of its provisions the most important legislative act of the century, rendered necessary after the dissolution of the monasteries, the only organization up to that time charged as a religious duty with the care of the indigent and suffering. Again to quote Mr. Trevelyan, "the Privy Council saw that all these multifarious duties were well and truly performed by the local magistrates."

In Elizabeth's reign they were probably discharged with more efficiency than at any time before or for many generations after. The function of the Tudor Privy Council was to teach not only Parliament to legislate but justices of the peace to govern and judges and juries to execute justice. The habit of self-government gained far more than it lost by the Tudor rule. This great process was set going by Henry VII and was carried out with ever-increasing momentum by his son and grandchildren, "a condition of things demanding conspicuous notice which has unfortunately been to a large extent overlooked in estimating the services of this great dynasty to the building up of English institutions upon a lasting basis, and the part played by the Council in this noble task."

The Council at this epoch was in fact the nation and spoke with the nation's voice in a way that it

has never done before or since, thus testifying to the part played by both Crown and people in together contributing to the new fabric of national life.

By the Union with Wales under Henry VIII, of which Trevelyan says, " This bold measure was the first and not the least successful Act of Union in British history," the principality was incorporated with England on equal terms, with the division of the country into twelve shires, the administration of which was placed in the hands of local justices responsible to the order of the Privy Council and the laws of Parliament. It is worthy of note that the authority of the Privy Council was invoked as being very necessary for the control of the lawless districts which made up no small part of the principality.

Hakluyt thus chants the epic of British sea-power under Elizabeth :

" Which of the Kings of the land before Her Majesty had their banners ever seen in the Caspian Sea ? Which of them hath ever dealt with the Emperor of Persia as Her Majesty has done and obtained for her merchants large and loving privileges ? Whoever saw before this regiment an English Ligier [Ambassador] in the stately porch of the Grand Signor of Constantinople ? Whoever found English consuls and agents at Tripolis in Syria, at Aleppo, at Babylon, at Balsarn, and what is more whoever heard of Englishmen at Goa before now ? What English ships did heretofore ever anchor in the mighty river of Plate ? Pass and repass the impassable Straits of Magellan, range along the coast of Chile, Peru and all the backside of Nova Hispania further than any Christian ever passed ? "

In justification of the insertion of this passage it should be remembered that in the promotion of all the enterprises so graphically portrayed the English Council identified themselves with the enterprises and ambitions of their Sovereign. Nor is it unworthy to mention on the spiritual side of the nation's life, with which both Queen and Council were in full sympathy, the identification of their rule with the movement that produced the great period of domestic architecture, by which the Tudor name was associated for all time with the English manor-house, and the tenderer art through the genius of which English music at the close of the Elizabethan era stood in the forefront of the music of Europe. Whether it served the purpose of the Roman Mass or Anglican worship, the music of the day touched the heart of the people as it had never done before, and with the discovery of the form of the madrigal drew them into an ecstasy of mass production unsurpassed for the beauty of its phrases and the outburst of lyric song which shares in its inspiration. The glory of Byrd, Morley, Farmer, and their contemporaries will never fade, for as it has been justly put :

“ The fine imagination of the greatest of the English madrigal composers may be said without exaggeration to have been equal to that of the poets [of the period], with the result that the music added new beauty to the ‘ golden-vowelled ’ lyrics and intensified their meaning, so that Elizabethan music was indeed ‘ married to immortal verse ’ in equal partnership.”<sup>1</sup>

Poetry and drama, music and architecture,

<sup>1</sup> *English Madrigal Verse*, 1588-1632, Preface, p. ix.



seemed to have given England for the moment a pre-eminence in the peaceful arts, as signal as her triumphs in discovery and the conquest of the sea.

The House of Commons, in which sat the flower of the Privy Council, besides fulfilling its purpose was in all essentials in close accord with the Crown ; its rebuffs were forgotten as when by an act of grace the Queen withdrew the unpopular measure " monopolies " and drew tears from honourable members, a moment of emotion, but two years before she passed away, that was adorned by the memorable avowal : " Though God hath raised me high, yet this I count the glory of my crown, that I have reigned with your loves." Even to the last she knew how to go straight to the hearts of her people, a lesson that her successor never learnt and his son only upon the scaffold.

The new organization of the Church having vested the supreme government in the hands of the Sovereign, a kind of ecclesiastical Star Chamber came into being, an offshoot in actual fact of the Privy Council but more directly inspired by the Crown, under the name of the Court of High Commission, which with Laud's high-handed conception of episcopal authority was destined to become a source of peril to the Throne, but in Elizabeth's reign, in spite of the distrust of Burghley and the suspicion of the Council and Commons, it enabled her to preserve the Anglican compromise, in spite of Puritan pretensions and the growth of ultra-Protestant tendencies in various quarters.

She was in fact the founder of the State Church as we know it, and the indefatigable advocate of the *via media* between Rome and Geneva.

Before entering upon the history of the Council during the Stuart régime up to the meeting of the Long Parliament, it is as well to have a clear notion of the principal weapon concerned in the abuse of the Royal power during the years under review, in other words, to trace the usurpation, if it is not too strong a term, by the Court of Star Chamber of functions, not within the purview of its originator, under the special character that contributed so largely to its unpopularity. From its origin as an elastic and equitable correction of the rigidity and precision of the ordinary Courts, it had in popular opinion become the flexible and aggressive instrument of tyranny, the symbol, as it were, of the abuse of power in its most offensive form.

The verdict of Professor Baldwin that in the Star Chamber we discover the direct descendant of the Council, as permanently located at Westminster from the earliest times in its most authentic form, appears to have the support of later inquiries and can claim the great authority of Albert Dicey in its behalf. "It is," he says, "with something of astonishment that the inquirer discovers that the Court whose overgrown powers the patriots of 1640 cast to the ground was the same body whose early encroachments had alarmed the parliamentary leaders" in the fourteenth century. The growth of its functions was rooted in statute and their exercise veiled under constitutional forms, so that throughout Tudor times the Court could fairly claim a preponderance of weight and utility in the application of its powers to the critical conditions with which it was called upon to deal; but towards the end of that period, which was marked by a great revival in the efficiency

of the Common Law and the agents of its successful administration, an antagonism was gradually developed between these rival jurisdictions, fomented in no small degree by the tendency of the prerogative Courts, of which the Star Chamber, as the direct representative of the Council, was the principal target of criticism, to introduce the Roman Civil Law into juridical practice, in the form recently stimulated by the studies of Renaissance jurists. The battle between the two was shortly to be waged between Coke and James I, and became in process of time one of the chief issues in the struggle that was to ensue upon the larger field of parliamentary hostilities, ending in the temporary collapse of the monarchy. It is easy, however, to prove that the so-called innovators were in fact and intention the faithful interpreters of an age-long tradition. The statute of Henry VII under which the Court of Star Chamber is said to have been endowed with new authority and to have received its chief enlargement of function was in large measure a declaratory enactment, designed to define powers which had been obscured by a generation of civil war, and so late as the days of James himself it was the doctrine of Lord Keeper Egerton "that the jurisdiction of the Star Chamber was merely the original jurisdiction of the King's Council." "Historical examination," says Dicey, "confirms the justice of this view,"<sup>1</sup> and no one is inclined to challenge it.

With sensible management the difficulties that ensued would never have come to a head. The source of trouble lay in the unpopularity of an alien and injudicious King, without his predecessor's

<sup>1</sup> Arnold Prize Essay, 1860, p. 48.

instinct not to press an invidious claim or to withdraw gracefully from an embarrassing situation. The Court was in no sense the modern creation of a monarch's caprice, although in the process of years it may well have become an instrument to be wielded with tact and discretion and not a bludgeon to be waved in the face of an exasperated people.

### *James I*

It is difficult to trace the actual changes, if any, in the character of the Star Chamber by the date of James's accession, but, according to Dicey's surmise, external pressure probably had the effect of making it more of a law court and less of a council, quoting as an indication of the coming change a regulation of 1553 whereby a committee was brought into being for hearing those suits which were wont to be sent to the whole board, and he even goes so far as to hazard the suggestion that had its powers not been so painfully strained under the first two Stuarts, which led directly to its extinction, it would have reached a stage of growth as distinct from the Council as was the Chancery. One circumstance that must have been in any case an obstacle to such a process was the peculiar feature in the Chamber's constitution under which the King himself often presided in person. This in the seventeenth century was no chance occurrence, for in the language of Hudson, a writer of the day, "no one had any power to pronounce sentence, for the judgment is the King's only, but by way of advice the Counsellors deliver their opinion, which he increaseth or moderateth at his royal pleasure." This was no vain assertion, for James once presided



for five days "seated on a high chair above the rest," and brought the case to a close by the delivery of a sentence, the wisdom of which is stated by the annalist to have surpassed that of any judgment before uttered from an English tribunal. On this occasion the English "Solomon" for once seems to have justified the title.

It was its methods that ultimately excited so much hatred, as a large part of the Chamber's business came in practice to be done upon secret information and the clandestine arrest of the alleged culprit, who neither was permitted to know his accuser nor the offence with which he was charged. The examination, as even Hudson admits, was conducted with scant fairness to the prisoner. If the process did not seem to justify condemnation, so keen was the Court to ensure conviction that another prosecution was undertaken by a bill of complaint addressed to the Council signed by one of its members; and if the prisoner still refused to plead, his silence was in due course treated as an acknowledgment of his crime, and if he put in an answer and underwent examination, witnesses, whose character the accused was not allowed to challenge, were privily examined and sentence ultimately recorded. Some of its proceedings are even amusing in their arbitrariness. Thus Sir Thomas Cheney, himself a councillor, Warden of the Cinque Ports and Treasurer of the King's Council, was, on the accusation of his own son, examined by his fellow-councillors on the charge of treason. The accusation happily fell through, whereupon the Council committed the son to the Tower "for an example."

The penalties imposed were of the most cruel and

vindictive character, death alone being outside the power of the Court, but fines, whipping, the pillory, and branding were all among the varieties of the day's work. Sometimes the offence itself suggested the appropriate treatment, as we can see in the savage humour of a sentence upon a man who objected on religious grounds to eat swine's flesh "that he should be imprisoned and fed on pork."

Behind all this armoury of oppression lay the power claimed by this Court alone, perhaps as some relic of ecclesiastical violence, of extorting confession by torture, and if not frequently exercised was a contingency ever present to the mind of the unfortunate on his trial. These powers, moreover, were not merely exerciseable in extreme cases, where the ordinary Courts failed to find suitable remedies or were for any reason incompetent to deal faithfully with a powerful prisoner. It was, on the contrary, the practice of the Chamber in sweeping into its net everything that could make its jurisdiction felt in every class of the community which was responsible for the bitter enmity engendered. The infamy of the judgments and the execration they aroused touched opinion and stirred up feeling in every phase of the nation's life. A chance word uttered in anger, but without malice, might lead to a vamped-up charge of libel, and where accusations of treason or sedition were concerned the Council lent a ready ear to the propagator of slander. Closely connected with these offences was the vigilant eye kept upon the proceedings of the Press, while the desire in certain quarters to curry favour with authority was no small incentive to the circulation of suspicions

of treason, which in those days had a constructive weight out of all proportion to the gravity of the language used. The danger of it all lay in the extent to which the jurisdiction of the Chamber, as an aspect of the King's Council, touched the reputation of the monarch and led to its identification with all the abuses of personal rule. This gave currency to every vehicle of calumny and discredit that could be devised to prejudice and belittle the chief of the executive. It is not indeed a matter of surprise that the accumulation of these offences built up a case against the Crown which, when the opportunity came, broke out in the passionate resentment of a large section of the population.

Besides claiming the right to try all causes for which the Common Law provided a remedy, the Council made no secret of its pretensions in dealing with those "not examinable in other Courts," such as offences arising out of the breach of proclamations, not confirmed by Parliament, a pure instance of the exercise of extra-legal powers, and in the whole field of what we should call the private relations of men and women; similar claims were asserted, not as it seems without a large measure of popular approval in many directions, that involved interference with domestic lapses from propriety which the law could not punish but the moral feeling of the age condemned. The minutes of the Star Chamber are full of punishments for acts which stop short of crime but might well be causes of complaint to members of the commonwealth. Thus in one instance a woman is said to have been punished for the strange offence of "practising to have her husband whipped," which is made all

the more singular by the discovery that the husband was dead and his father the prosecutor; and in another case upon a quarrel between husband and wife, the Council at the latter's complaint—

“ordered the husband to make her an allowance of forty marks yearly and let her dwell one year's time in her brother's house, at the end of which the man was not to be relieved from the said payment unless he should resort to his wife and use her after such a sort as it behoveth an honest man to use his wife”—

a remarkable proof of the State's care of personal conduct. Examples of the kind at least serve to show how closely the Council touched national life in its most intimate aspects and raise no little wonder that such experiments on popular patience did not give rise to even more resentment.

Such occurrences, however, must not be allowed to obscure graver activities, such as the use of means at the Council's disposal for bringing pressure upon the Law Courts either to forgo their privileges or consent to their mutilation. Thus in some cases proceedings were transferred to the Star Chamber by Royal authority when the decision of the Court was still pending, a step that was often the prelude to the King taking the matter into his own hands, which not infrequently meant the pardon of the offender on his payment of a large sum of money into the Treasury, such as is recorded in the minutes of the Council: “The Earl of Derby for his pardon £6,000,” or some lesser sum in the case of humbler persons. Since the King's Court was not empowered to impose the penalty of death, it was a



positive advantage to anyone of importance charged with murder to have the cause so transferred, as it commonly resulted in the delinquent getting off cheaply. Another mode of interference which led to the trafficking with justice was the practice of summoning juries before the Council to render an account of their verdicts, a mode of intimidation that was very effective in teaching those who served on them to be prudent in their judgments.

"I have seen in my time," writes the author of the *Treatise on the Commonwealth*, "that an inquest, for pronouncing not guilty of treason, contrary to such evidence as was brought on, were not only imprisoned for a space, but a large fine set on their heads which they were feign to pay"—

a form of words which raises the doubt whether among the forty jurymen convicted of perjury within a year, as mentioned by Hudson, some were not martyrs to their sense of justice.

The infliction of torture by the Council was no doubt held to be one of its powers and that not sparingly used. Perhaps the most memorable instance of exposure to this ordeal is that of Anne Askew in the last year of Henry VIII, when Wriothesley, the Lord Chancellor, and Rich, the Solicitor-General, with their own hands turned the screws of the Tower rack. Guy Fawkes was submitted to the same process.

Meddling with civil suits, which had some success at the outset, seems to have fallen into disuse until under Charles I attempts were made to revive them; but the most flagrant act of usurpation was the pretence that not merely collectively as the Coun-

cil but independently as councillors they had the privilege of arresting ordinary citizens, and it is at least as strange that the judges were to some extent disposed to admit its validity, at any rate when covered by the authority of the Council at large. Before, however, the close of Elizabeth's reign they were moved to a strong protest against such abuse of power, thus addressing her :

“ We beg that Her Majesty's subjects be not committed to nor detained in prison, by the command of any nobleman or counsellor, against the laws of the realm, to the grievous charge and oppression of Her Majesty's said subjects. Some parties so committed, after they had been lawfully discharged in Court, have been soon recommitted to prison, in secret places so as upon inquiry the Queen's Court cannot learn to whom to award Her Majesty's writ, without which justice cannot be done.”

Professor Dicey thus sums up the moral of the epoch :

“ The Council stands forth as at the same moment powerless and powerful. In its dealings with the Crown it is utterly weak, for it has lost every element of independence. In its dealings with the people it is irresistibly strong, because it combines every element of authority. The ablest administrators of the day are its members. The political powers which it exercised in the fifteenth century remain (except in reference to the King) unimpaired, and to these powers has been added all the authority of a law court and nearly all the influence of a legislative assembly. Above all, the whole body is subject to one head. The King is all in all : and the Tudor princes were exactly the

chiefs which the Council required ; for with many faults they combined an appreciation of talent which made them appoint able Ministers, with a love for business which enabled them to keep in motion the cumbersome machinery of government, of which they themselves were the creators.”<sup>1</sup>

<sup>1</sup> Arnold Prize Essay, 1860, p. 56.

## CHAPTER VII

### THE STUARTS AND THE STAR CHAMBER

It was the aim of the Tudors to give every part of the administrative machine a definite position, and to this end they sought to frame the Council on a living and orderly footing, clearing up the obscurities which threatened its efficiency and stood in the way of its popular apprehension. Thus, taking in hand all the elements of the problem, three groups of councillors were brought to light : first, the King's Privy Council, wherein the hereditary claims of the nobles as a body were fully admitted ; then the ordinary Council, which was mainly served by a less pretentious group of professional men ; while outside these were the justices and "others," the relic of mediæval times still occasionally invoked to give legal advice.

On the withdrawal of their strong hand and under the strained conditions of James's reign the incompatibility of council rule with either parliamentary government or the claims of justice then alive in the heart of the people was more and more apparent. In the lifetime of Robert Cecil the change was not so obvious, but his unworthy and incompetent successors made it only too evident. Unless the Crown was prepared to make large concessions to the spirit of the age, revolution in one form or another was inevitable, but neither James nor his son had the insight or the disposition to initiate



the steps which could avert it. Dicey sums up the situation in these pregnant sentences :

“ The period, therefore, between the death of Elizabeth and the Restoration may be considered as the time during which ‘ government by Councils ’ fell. It is an apparent contradiction of this view to assert that the Council’s powers were never stretched so far as under James and his son. Nevertheless, both the assertion and the theory are true and consistent. The Council put forth all its powers during the reigns of the first two Stuarts, but these exertions of authority were signs of death. The Stuart Kings acted, not with the consciousness of undisputed sway which distinguished Henry VIII, but under a strong, though it may be an unconscious feeling, that their power was in danger and needed to be increased if it was not to be lessened. Hence all the acts of their Government are stamped with the impress of innovation. Few men perceived the true state of affairs, least of all Charles or his father. Strafford alone saw how matters really stood, and it is this clearness of view which gives to his policy of ‘ Thorough ’ a consistency which the Stuarts’ other acts of tyranny want.”<sup>1</sup>

If James’s eldest son had survived him, the situation might have been eased, but Charles, with a character in many respects more pleasing than that of his father, suffered from a blindness and obstinacy even greater. The Council was a weapon in their hands which they used ruthlessly, and it was significant that with the restoration of Parliament to its ancient seat the first victim of popular vengeance was the Star Chamber.

Developed by a strained interpretation of statute,

<sup>1</sup> Arnold Prize Essay, 1860, p. 59.

and as Hudson states, "no settled court of judicature but only an assembly for consultation at the King's command upon some urgent occasion in cases where all other courts want power," it had challenged all authority, invaded every jurisdiction, and proclaimed its freedom from all restraint, until it was swept away in a sentence, as by the terms of the Great Statute XVI, Car. I, it was enacted that "the reasons and motives for the erection of the Court of Star Chamber do now cease."

Thus perished from the abuse of power the eldest line of the Privy Council, which from the *Curia Regis* of Norman Kings had traced the footsteps of the English monarchy down the path of history. With the purest descent from the feudal stem, it had an indisputable title to be looked upon as the elder branch, and, in spite of fitful failure and temporary eclipse, had not in the main proved false to the principles of its origin or to the urge of a secular call. In a sense the rule of the Council may be said to have justified itself by its uses, and though it survived the impulse which gave it birth and lived to be the victim of its own excesses, yet, like most of the works of man that play a lasting part, it had its day of pride and purified aim.

With the Star Chamber there passed away those other outgrowths of the Privy Council, the Court of High Commission and the prerogative jurisdiction of the Councils of Wales and of the North, thus extinguishing almost the whole field of conciliar activity and reducing its functions to what we should now call the work of an enlarged Cabinet.

In analysing the causes that led to the segregation of the Star Chamber from a mere expansion of the

Council's business, Sir W. Anson, with the insight that illuminates all he wrote, accepts the view that its original jurisdiction as a Committee of the Privy Council is traceable to extreme antiquity and may have drawn some formal sanction from the Act of Henry VII, with which its uses were largely identified. He, however, shows that as time went on and the division of the work of the Council between matters of public interest, foreign or domestic, and those between party and party increased, the latter came to be dealt with by special reference to the Star Chamber, and when that Chamber is mentioned in the Acts of the Council, it is as the Court in which a case should be tried, before which an individual should appear or a jury be censured. Thus we have two Courts, both of them exercising inquisitorial and judicial powers, one making only an occasional use of them and engaged mainly in administrative work. The situation is thus summed up in Anson's own words: "The Star Chamber was a Council of the Crown, it exercised a jurisdiction which the Privy Council might have exercised, but it included persons whom the Privy Council did not include."<sup>1</sup>

With these obscurities cleared away we may now resume the story of the Council in its ordinary aspect during the reign of James I, on the threshold of which the student is left without records, as its

<sup>1</sup> *Law and Custom of the Constitution*, ii. 73. "Bacon describes the Court as compounded of four elements, Councillors, Peers, Prelates, and Chief Judges. Hudson moreover states that Lords of Parliament who were not members of the Privy Council claimed, and in some cases exercised, the right to sit and give judgment."

proceedings for the first ten years, 1603-13, were destroyed by fire ; thus involving the disappearance of whatever official account was preserved of Sir Walter Raleigh's examination in the council-chamber upon the trumped-up charge which led to his imprisonment for thirteen of his remaining years. The loss of these papers is the more to be deplored that in accordance with the usual practice the examination was put in as evidence before the special Commission for his trial convened to sit at Wolvesey Castle, Winchester, under the presidency of Lord Chief Justice Popham, the leading counsel for the prosecution being Coke, who displayed all the resources of his brutal nature in the defamation of the accused. It was this speech of which Lord Mansfield said : " I would not have made Sir E. Coke's speech against Sir Walter Raleigh to gain all Coke's estates and reputation." The overt acts charged against him and presumably submitted to the Privy Council were having entered into a conspiracy with Lord Cobham and his brother to dethrone the King, and written a book to the prejudice of His Majesty's title, and it was further alleged to be the object of the conspiracy to obtain the aid of the Archduke of Austria, Governor of the Netherlands, and the King of Spain in order to advance Lady Arabella Stuart, the King's first cousin, to the Crown.

Sir John Macdonnell, in a book published after his death, makes an exhaustive investigation into the subject with the verdict :

" Of Raleigh's complicity in any plot there was practically no evidence except some ambiguous



words, quite compatible with ignorance, which it was said he had used in conversation with Cobham, whose testimony contradicted itself. No circumstance could better emphasize the contemptible character of the King than Raleigh's arrest upon the terrace of Windsor Castle while waiting to go for a ride with His Majesty."

The alleged implication of Lady Arabella, the daughter of Darnley's younger brother by a sister if the 1st Earl of Devonshire, in this plot does not seem to have been taken seriously, as James made no change in her treatment; but later, on her engagement to William Seymour, the grandson of Katherine, sister of Lady Jane Grey by Edward Earl of Hertford, she and her betrothed were summoned before the Privy Council, where he recorded a solemn declaration that he would never marry her without the King's consent. However, early in July 1610 they were privately married and were both placed under restraint by the judgment of the Privy Council, upon her escape from which and recapture she was lodged in the Tower till her death on September 25th, 1615. During this period there are a number of references to her in the Acts of the Privy Council from the date at which their story is resumed. One at least, dated the year before she died, shows that she was treated with some degree of lenity, as in a letter to the Lieutenant of the Tower he is instructed to give Samucl Smyth, "employed by her ladyship in her private affairs, accesse as well to give her an accompt of his proceedings therein as to receive further directions for ordering the same at convenient and seasonable times."

The record ends in a posthumous investigation

undertaken by the command of the King, which is thus described :

“ Whereas a reporte was given out amongst divers persons that the Ladie Arabella Seymoure, late wife of Sir William Seymoure, Kt., daughter to Charles Stewarde and grandchild to Matthew Earl of Lennox, had a childe borne during her confinement in Sir Thomas Parrie’s house at Lambeth in the year of Our Lorde 1610, His Majesty commanded us whose names are underwritten [George Canterbury, Thomas Suffolke, Treasurer, Ralphe Winwoode, Secretary of State, Francis Bacon, Attorney-General] to take notice thereof and to procede as should bee expedient for the manifestacion of the truth of this reporte or upon what groundes the same was raysed. Whereupon having called before us Sir William Seymour, Kt., late husband to the Lady Arabella, and others attendants and servants of the said Ladie and questioned them particularly and aparte whether the said Ladie had a childe borne during her abode at Sir Thomas Parrie’s house at Lambeth, or elsewhere, and what the utmost of their knowledge was in that behalf, forasmuch as neither Sir William Seymoure nor anie of the rest could speake directly to that matter nor delivre anie thinge of their knowledge materially, but what they had heard doubtfully reported touching a conceipt of her being with childe at that tyme and that all that anie of them could say in that business had relacion and reference to one Mrs. Ann Bradshawe, a gentlewoman attending at that time neare the person of the said Ladie Arabella and best able to clear that doubte, wee thoughte it requisite to sende for her, but understandinge that such was her weakness and indisposicion of boddie, that she could not take soe great a jorney at soe unseasonnable a tyme of the yeare without dainger of her life we gave order

to Mr. Edmondes, one of the clerkes of His Majesty's Privy Council, to make his repaire unto her at her dwelling house at Duffielde in the countie of Derby, and to examine her upon such interrogatories, as by our instructions were delivered unto him, who accordingly repaired thither and tooke her examination as it followeth *in hæc verba*.

*" The examination of Ann Bradshawe taken January  
21, 1616*

" To the first she sayeth : Shee never knewe that the Ladie Arabella had a childe, but she confesseth that she had heard that the said Ladie Arabella had a childe, for such a reporte there was but she knew it to be a starke lye, for she well knoweth that the said Ladie Arabella never had anie childe duringe the tyme this examinaunt served her ; and this examinaunt served her continually almost ever since the Kinge came in to Englande untill a yeare or little more of her death. She sayeth that she waited on the Ladie Arabella when she lay at Sir Thomas Parrie's house at Lambeth and at that tyme the said Lady Arabella was somewhat distempered in her boddie, which caused her to swell, so that her gowne was lett out and that was some cause of the reporte that shee was with childe and, as this examinaunt remembereth, the Ladie Arabella did then let fall some wordes, as though she had thought herself with childe, at that tyme beinge aboute three monethes after her marriage and she apt enough to entertaine that concept, but upon this examinaunt's knowledge it proved not soe.

" Shee further sayeth : Shee never told Doctor Momforde that the Ladie Arabella had a childe, but duringe the tyme of her distemper, and before her boddie fell againe, this examinaunt might answere

doubtfully to Doctor Momforde touching her being with childe, but divers did thinke shee was with childe until the distemper fell into an issue or flux of bloode which came from her, parte of which bloode the Ladie Arabella showed to Doctor Momforde, as this examinaunt well remembereth.

"She sayeth: There was never any midwife bespoken for the Ladie Arabella, to this examin-aunt's knowledge, neither was it likely that a midwife should be provided within three monethes after her marryage and upon such incertainties.

"She sayeth: That as the Ladie Arabella's boddie begann to swell within a moneth or twoe after she came to Sir Thomas Parries, soe the issue of bloode tooke her duringe her aboade there and continued tenn days or more. For any other cause or grounde of reporte that the Ladie Arabella should bee with childe, this examinaunt knoweth none and well knoweth that the Ladie Arabella never had anie childe. And this is the truth of this examinaunt's knowledge touching this matter as she will answer the same upon her dutie and allegiance.

"ANN BRADSHAWE.

"Examinatur per C. EDMONDES.

"And for the further declaracion of the trueth thereof and the better satisfaccion to any to whom it shall appertain we have caused this Act to bee made and by subscription of our handes doe witnesse that this is the trueth of that matter which together with the originall examination of the said Mrs. Bradshawe is to remaine amongst the records of Councell Causes.

"GEORGE CANTERBURY, THOMAS SUFFOLKE,  
RALPHE WINWOODE, FRANCIS BACON."

For directness and pertinacity of intention to arrive at the truth this examination could hardly



have been surpassed and does credit to those engaged in the inquisition, but it would have fallen strangely on modern ears if it were announced that the Archbishop, the Prime Minister, a Secretary of State, and the greatest philosophic intellect to be found in the ranks of the Privy Council, say Lord Balfour, were charged with such an inquiry.

It is fortunate, with a view to the disclosure of the actual work of the Council at this period, that, starting from May 1st, 1613, "the Acts" down to December 31st, 1617, have recently been printed and may be accepted as a sufficient index of its normal routine until the years when civil war was imminent.

*The names of the Lords and others of His Majesty's  
most honorable Privie Counsell*

1. George, Archbishop of Canterbury.
2. Thomas, Lord Ellesmere, Lord Chancellor of England.
3. Henry, Earle of Northampton, Lord Keeper of the Privy Seal.
4. Ludovick, Duke of Lennox.
5. Charles, Earle of Nottingham, Lord High Admirall.
6. Thomas, Earle of Suffolk, Lord Chamberlain of H.M. Household, made Lord Treasurer of England, July 10th, 1614.
7. Gilbert, Earle of Shrewsbury, Justice in Eyre.
8. Edward, Earle of Worcester, Master of H.M.'s Horse.
9. William, Earle of Pembroke.
10. Thomas, Earle of Exeter.
11. John, Earle of Marr.
12. Alexander, Earle of Dunfermline, Lord Chancellor of Scotland.

13. Robert, Viscount Rochester, cr. Earl of Somerset, November 4th, 1613.

14. Thomas, Viscount Fenton.

15. Edward, Lord Zouche.

16. William, Lord Knollis, Treasurer of the Household.

17. Edward, Lord Wotton, Comptroller of H.M.'s Household.

18. John, Lord Stanhope, Vice-Chamberlain.

19. Sir Ralph Winwood, Kt., Secretary of State.

20. Sir John Herbert, second Secretary of State.

21. Sir Julius Cæsar, Kt., Chancellor of His Majesty's Exchequer.

22. Sir Thomas Parry, Kt., Chancellor of the Duchy of Lancaster.

23. Sir Thomas Lake, Kt.

The oath taken is textually the same as at the present day, but it is to be noted that the Secretary of State was sworn in almost identical terms and not in the brief form now in use, which omits the repetition of the P.C.'s obligations. It will be seen that the Council had the same elements as to-day, Ministerial, Household, and unattached, in the proportions 9, 5, and 9 respectively, and it may also be noted that the Peers were with two or three exceptions new men, whose status rested on recent promotion.

Commercial and maritime law up to the point of development reached at the date were a constant interest of the Council, and in no sense were they behind the times in their application to the problems with which they had to deal. It is refreshing indeed to turn from the arrogance and ineptitude of the Star Chamber to the patient spirit of inquiry which the King's Council in ordinary brought to the elucidation

tion of the internal and economic difficulties characteristic of the age.

On examination of the "Acts" we are struck by the multifarious character of the duties undertaken by the Council and the wide range of its operations, which seem to extend over the whole field of national and local concern. For the most part, too, it is obviously moved by a genuine desire to give effect to the claims of justice and good feeling, as they were understood at this inchoate stage of civic freedom. Respect for personal rights is perhaps more marked than students of the period have led us to look for, as upon the whole the reader is struck by the pains taken in such cases to elucidate the facts and give to all parties a patient hearing with the object of reaching a fair decision.

Thus we find among aims of the Council's intent, matters affecting the good of the community, as the reclamation of lands from the sea; complaints against the Commissioners of Sewers for neglect of internal drainage; obstruction to shipping by accumulation of refuse in the Tyne and other rivers; bad quality of coal supplied to consumers; grievances arising out of the abuse of creditors' rights; undue exactions in the practice of trade or administrative action; breach of trade regulations; forced sales at unremunerative rates; restraint on excessive or illegal building; decay of cloth weaving, in which connexion an Order of Council begins with the preamble: "Forasmuch as cloth is the noblest and richest manufacture of the kingdom"; the purchase of wools by unauthorized persons to the hurt of legitimate traders during the close time for such goods; illicit trade of Dutch in the Cinque

ports, especially Sandwich, which led to the export of raw material for the profit of alien handicraftsmen and engrossers of wool, an abuse shared by the activities of the same people at Colchester.

Among public bodies responsible to the Council, the Trinity House received an important part of the Council's attention in seeing to the due execution of the Corporation's duties of lighting and buoying, so far as practicable, rivers and estuaries, a task of no little trouble and exertion with the primitive resources of the day. It also fell to the Council to provide by letters to the Lord-Lieutenants for the due supply of men and material in time of war, and recourse was had to the same method, if less legitimately, to supplement the wants of the Crown in its conflicts with a niggardly or distrustful Parliament. Ireland and the Channel Islands made large demands upon the time of the Council, when it is worth observation to what an extent the powers of the King were used to bring over young Irishmen to this country for their training and education, with the purpose in reserve to withdraw them from Catholic influence. In the same connexion the duty to stamp out recusancy was a constant object of the Council's vigilance.

It is no less interesting to note, perhaps because of the risks to religion involved, that people projecting a tour on the Continent had to obtain the approval of the Council, which covered the necessary equipment and the attendance of at least one servant, the period of time being limited in most cases to three years. The only other motive given as a ground for such a permit is the health of the applicant which makes it necessary for him (or her) to have



recourse to a foreign "sparre," and these permits appear to have been given on quite a lavish scale. It may be assumed from the document issued that the place we now know as Spa was the only resort of the kind to be found at that time in Europe.

It is not easy to determine the precise relations between the Privy Council proper, that is, the body more or less attached to the King's person and always available for counsel or to give effect to His Majesty's purpose, and the jurisdiction of the Star Chamber. However, the volumes under review do give some indications upon which opinion can be formed, and it may be said at once that the facts to which they bear witness go far to support Sir William Anson's considered advice as given above that "it [the Star Chamber] exercised a jurisdiction which the Privy Council might have exercised, but that it included persons whom the Privy Council did not," whether they were there only as assessors or enjoyed the full rights of the Court by virtue of special competence. Thus in a letter to Sir Francis Bacon, at that time His Majesty's Attorney-General, submitting "a complaint of a notorious abuse and outrage," it is described "as of such a nature as is very worthy of the Starre Chamber," and he is instructed to proceed with the prosecution with "all convenient expedition." At the same time the Council clearly enjoyed the power to revise its sentences, as in another case we find His Majesty "pleased to remitt and forgive such further punishment as hath been adjudged in Star Chamber to be inflicted upon the person of James Ingraham now a prisoner in the Fleete," and the Attorney-General

is instructed to draw a pardon for His Majesty's signature. Sir John Yorke, also a prisoner in the Fleete, had the benefit of the Royal clemency, as the Law Officers were instructed to consider the propriety of his enlargement upon security given to abide the censure of the Courte of Star Chamber in a case depending there.

On the whole, we may conclude that the Council in judicial matters was disposed to lenity and the kindred tribunal to rigour. It is perhaps for this reason that offences touching the King's person or property were relegated to it, for we find an instruction of April 25th, 1614, to the Attorney-General in respect of a serious complaint of "riotous entry into a coppes called Newland for preservation of His Majesty's game in that part of the forest of Windsor by pulling up and overthrow of a hedge and ditch," charging him, if he finds the offence deserves it, to proceed against the culprits in the Starre Chamber.

Trade monopolies were in those days, perhaps rightly, regarded as sacred, and we are not therefore surprised that a merchant accused of infringing the rights of the Levant Trading Company by the illicit charter of a ship conveying "divers and sundry" English commodities to the East was given the choice of declaring himself a stranger and paying the dues for which he was liable or of undergoing such censure and punishment "as upon a bill to be preferred against him in the Starre Chamber he may be found to deserve." It may be assumed that, with such a choice offered, exile was preferred to the tender mercies of the Court.

Another hunting affray appears to have involved

the Chamber in some odium, as in a complaint of Lord Compton heard before the Council consisting of—

“ the Lord Chancellor, Lord Treasurer, Duke of Lenox, Earl of Worcester, Earl of Pembroke, by His Majestie’s express commaundement referred to the Lordes above written against George Catesby and Henry Lane of the County of Northampton, esquiers, in which his counsell did informe their Lordships that besides a particular riotous hunting by nighte in his parke at Yardley for which his Lordship had a bill depending in the Starre Chamber upon which the defendantes have been examined and did upon their answers contradict and falsify one another, they have since promoted seven severall riotous huntinges in the purlew, whereof some have been very greate and outrageous as well in respect of the greate number and unlawful weapons as gunnes and suchlike, as also in respect of divers unfitt wordes and speeches uttered by them, some of them tending to contempt of the High Court of Starre Chamber. Yet with a wish that enmity and unkindness between the partyes might cease and such neighbourly correspondence be held and settled between them as the deare may hereafter be preserved and yet without oppression unto them that have the purlew groundes they did first move and entreate the said Lord Compton that his Bill in the Starre Chamber might be forborne for the two next terms of Trinity and Michaelmas to the end that in that space of tyme it mought be seene and observed, whether the said partyes complayned of would by their future carriage and behaviour as is by them promised, deserve so much further favour, as to have the sayde Bill absolutely withdrawne ; or otherwise their Lordships will be pleased to gyve Lord Compton their lawful furtherance

in course of justice as against persons contemptuous and refractory."

It having appeared during the progress of the case that the King had often been pleased to resort for his "delighte and recreation unto the said chase which their Lordships conceive much to aggravate the quallity of their sayd offence," there was less difficulty in composing the quarrel on the terms suggested, and we cannot refuse our admiration to the tact and prudence applied by the Lords concerned to the appeasement of so much ill-feeling, while the narrative affords an interesting picture of the social relations of the age and the risk to the comity of county life which such outbreaks occasioned.

With a view to averting any further trouble, Sir William Lane, Mr. Catesby, and Mr. Henry Lane were "enjoynd" that neither they nor their "servantes or tenantes" should "hunt any deare whatsoever" and hunt in the purlaws only "with cures or dogges not able to kill the deare." While, to make things even between the parties, in ordering all actions and suits to cease they did much condemn "the wordes spoken by Lord Compton at the former hearing of the cause."

On the petition of Sir John Hollis, Kt., for his enlargement out of prison, the Council instructed the Attorney-General that upon good and sufficient bond for his appearance being taken he should "be freed from that parte of the decree of the Star Chamber as dothe concerne the restraint of his person."

In contrast to this relaxation of the Chamber's



rigour, two instances follow of advantage being taken of that rigour to remit to the Courts cases of contempt. In the first certain substantial citizens of London were called before the Board "for refusinge to pay such money as they had compounded for with His Majesty's commissioners for new build-ings contrary to His Majesty's several proclama-cions" and ordered to pay the sums due "before the end of the current month on pain of being proceeded against in the High Courte of Starre Chamber for their several contempts against His Majesty's proclamations." In the second case sundry persons chargeable with the same offence were enjoined to pay the amount of the fine "within one weeke following, lest they should be proceeded against in the High Courte of Starre Chamber"; and on failure to comply with the said direction they were further ordered to present themselves before His Majesty's Attorney-General to be "examined according to their several contemptes in buylding contrary to His Highnes' said proclama-cions and to be bound to appear in the sayde High Courte of Starre Chamber to abide the censure of the sayde Courts concernynge the same."

It appears on consideration of the case before mentioned<sup>1</sup> the Law Officer did not see fit to recom-mend the contemplated indulgence in favour of Sir John Yorke, who accordingly remained with his wife in the Fleete as decreed by the Star Chamber.

In a letter to the justices of assize in Suffolk commending to their vigilance further complaints "concerninge the innkeepers and ale-house keepers in St. Edmundsburie," they are reminded that "His

<sup>1</sup> See p. 142.

Majestie in his princely care was pleased *at the Star Chamber* in the end of Trinity tearme to remember unto you the disorders of ale-houses and tiplinge houses," a formal announcement which confirms the impression made by one or two other minutes that the Council was wont now and again to meet in the Star Chamber, which has some bearing on the fundamental identity of the two Courts. This identity is further established in a letter addressed to the King by the Council which opens in the terms following :

"May it please your most excellent Majesty, this morning between eight and nine, according to the commandment received from your Majestie's mouth, we, your humble and faithful servantes assembled together in the Starre Chamber with purpose to hear and censure the cause depending between the Lord Darcy and Mr. Jervis Markham."

The letter goes on that "upon some opening of the cause by Mr. Sollicitor to us before we went into the Court as wee use to doe sometimes and conferre together in cases of weight" (a curious sidelight on Privy Council practice)—

"Wee were divided in opinion whether the case of Markham might fall within the compasse of a challenge (for the punishment of which kind of insolvency your Majestie did expressly command our attendance) as well because the wordes of the letters are not a direct challenge as because it was spread abroad both before the time limited by the proclamacion and before the proclamacion could come to his knowledge."

Whereupon after these discreet and cautious reservations, which do credit to the moderation

of the tribunal, it was suggested that it would be more agreeable for His Majestie's service "to putt off the hearing of this cause for this time."

The disposition of the Council to deal fairly with persons charged with offences prosecuted in the Court of Star Chamber even under a "byll in the name of His Majestie's Attorney-General" is shown in their treatment of a case where it was alleged that coals shipped at Newcastle were "mingled with black earthe or slatte or other unmerchantable stuffe to the prejudice and losse of the subject." Upon which the Council took note of the effect of such charges "to the trouble and disturbance of many poore mariners," and ordered an inquiry by the Lord Mayor and Aldermen of the city, pending which prosecutions under the Bill should cease, provided that if the officer for search and survey of coals shipped at Newcastle "shall finde cause to bringe any man into the Starr Chamber for that deceit he shall make himself relator to the Bill." (February 11th.)

Further light is thrown upon the case of Sir John Yorke and wife, "heretofore by decree of Starr Chamber committed to the Tower and since that time removed to the Fleete," in a letter to the Warden announcing that Sir John "having lately conformed himself to the religion established in this realm as appeareth by diverse certificates in that behalf and taken the oath of allegiance," the Council have been moved to give him his release and desire the Warden "to enlarge and sett at liberty" him and his wife, for which the formal warrant was issued a few days later.

*February 25th, 1617.*—Nineteen councillors were

this day assembled to consider the report of the Committee charged with the inquiry ordered upon the 11th of that month respecting the quality of coal shipped at Newcastle, with the complaint of which the towns of Lynn Regis, Yarmouth, Ipswich, Harwich, and Woodbridge had associated themselves, and the report itself is interesting enough to justify a pretty full description for the light it throws upon the aspects of coal-mining three hundred years ago.

“Accordinge to Your Lordships’ order,” it proceeds, “we called the parties to the controversie before us and deliberately heard the objections on both sides. And for our better informacion of the truthe of the pointe of mixture of coales we did alsoe conferr with the coale masters of the citty and also with the traders and retailers of coales, who with one consent do deny any such mixture of slate, stone, or black earth hath hitherto ever been used among the coales brought into this citty. And as touching any mixture with other unmerchantable stuffe, we do not finde upon hearing the alegacions of both parties any colour to mayntaine that suggestion, but only this we finde, that there are severall sortes of coales in those partes, some better and some worse, which doe rise some tymes out of severall mynes, and some tymes out of one and the same myne. . . . And we are of opinion that the mixture of the better with the meaner coales is necessary for the good of the subject, as it is commonly used, both for enlarginge the quantitie of coals, which otherwise would not serve for the provision of this citty and other partes, as alsoe for keeping them at a reasonable price. And we finde it by conference with men of experience that the mixture of these severall sortes of coales maketh them to burne into cakes, which some sorte of good



coale will not doe, and by that meanes the mixed coale is a more lasting fuell by much than the other. . . . And although some of the traders in coale doe acknowledge that they have sometymes coales brought to them not so serviceable for the hearth as they desire, yet that falleth out but seldome, some of them affirminge that they have not mett with two shippes ladinge of such coale in seven yeares tradinge.

“And we doe not find but that the worst coales are also merchantable, as being useful for lyme burners, brick burners, dyers, and such like, and therefore are not to be reputed as unmarchantable stuffe. . . . Which,” the order proceeds, “beinge this day reade at the Boarde and the matter debated at large by their counsell learned upon both sides, on due consideration of the cause it was ordered that Mr. Boyde shall make himself relator to all such as are or shall be brought into the Starr Chamber for this deceit. And alsoe forasmuch as it is alledged that the defendantes are either coal-owners or marriners and sea-farringe men that cannot attend the proceedings of Star Chamber, but to their infinite prejudice and damage, that some three or foure of them at the most do appeare as is usual in like cases and that the rest, that shall be informed against, doe answere by *dedimus potestatem*.”

A reasonable judgment and thoroughly justified by the finding of the report, which left the Star Chamber with no excuse but to treat the defendants leniently.

*June 23rd, 1617.*—A letter to the Law Officers enclosing “the copie of a letter from the Lordes of the Councill attending His Majestie’s person in Scotland” alleged that the Sheriff of Yorkshire had acted with “a rashe presumpcion” in making a proclamation without warrant by colour of some

verbal direction from His Majesty. Wherefore and in order to satisfy His Majesty's subjects who may be scandalized by his conduct it is decided that he should "bee proceeded withall in the Star Chamber" unless His Majesty in the meantime should prefer any other course.

This minute is valuable as giving proof that the King in Scotland had about him a sufficient body of councillors and that in matters touching the King directly the Star Chamber was held to be the proper Court for their investigation.

In the sequel to the threatened proceedings against the Sheriff it appears from a letter to the "Lordes of the Counsell" attending the King in Scotland that the proclamation was touching recusants, and seeing that—

"the directions as they were delivered were full both of wisdom and justice and therefore the error of the Sherife the more unhappy or his presumption more inexcusable, if his mistaking were with full and malicious intent, we convoked him before us, and *conceiving an offense of suche a highe and extraordinary nature to be proper for the Starre Chamber*, . . . we sent him to His Majestie's learned counsell to be examined that if they could obtain a confession from him he mighte then have been proceeded against in the *Starre Chamber* the next terme";

but, the letter goes on, "so far is he from that humility" and—

"such is his frowardnesse as to his first presumption he addes a second that is to contest with His Majestie and your Lordships and to justifie himself in his proceedings, whereof a copie is sent with an intima-

tion that they could do no less than to commit him afterwarde to the Fleete there to remain for a month or thereabouts until the next assizes at Yorke where because both his service and his purse is especially necessary, they purpose to send him down upon a good bond to returne again to prison as soon as the assizes are done."

A Yorkshireman's character, it will be seen, has not undergone much change in the course of three centuries, and the Royal Scot must have felt himself up against a very resolute and indomitable type of person.

An extraordinary case involving process in the Star Chamber was explained to Mr. Secretary Lake for His Majesty's information; it arose out of an unseemly act of high-handed violence on the part of Sir Edward Coke relating to the custody of his daughter by his marriage with Elizabeth, daughter of Thomas Cecil, 1st Earl of Exeter, and widow of Lord Hatton, and was first mentioned in the following letter from the Council to Sir Edward :

"Whereas complainte hath been made unto us by your wife that her youngest daughter being gon a little into the country to take the ayre for a day or two, you followed after and with greate vyolence brake open the dorre, dragged out your daughter with such violence and fury as she is fallen desprately sicke. In regard thereof she humbly prayeth she may be presently brought to London where she may have the helpe of phisicke for the recovery of her health. And forasmuch . . . as this cause is appointed to be heard and examined by this Boarde . . . where we desire you to be presente, these are therefore to will and require you to deliver the

person of your said daughter unto this bearer, the Clarke of the Councell, to be kepte in his house till the cause be hearde."

An interim order was issued to the said clerk to see that two gentlewomen should be appointed to attend the young lady while in his house, the one chosen by Sir Edward and the other by Lady Elizabeth.

Taking up the thread of the story as conveyed to Mr. Secretary Lake for the King's information :

" There was a petition delivered unto us upon Sunday the 13th inst. by the Lady Hatton [Lady Elizabeth] complayning in somewhat a passionate and tragicall manner that while by His Majestie's grace shee was settlinge and securinge her poore fortune, she was by vyolence dispossessed of her childe and informing us that in regarde of her daughter's weak constitucion shee had sent her to Sir Edmunde Wythipole's house for a small tyme and that it was not done in any secrett manner, whereupon Sir Edward Coke never askyng or taking accompt what was become of her, but pretending warrant, as he said, from the Boarde, had the day before with his sonne and ten or eleven servantes weaponed in violent manner, repaired to the house where their daughter was remayninge and with a piece of tymber broken open the doore and dragged her alonge to his coach with many other circumstances too long to trouble His Majestie withall. Whereupon in regarde the complaint containned matter of ryott and disturbance such as hath not happened since His Majestie's departure into Scotland we appointed the Tuesday following for the hearing of Sir Edward Coke. The matter being thus ordered we fell to other business amid



which the Lady Hatton came again to the Councell Chamber doore and desired to have accesse to the Boarde, which being admitted, she was tolde that order was taken concernynge her petition, but shee making further instance desired her daughter might be forthwith sent for in regarde she was growne to that weakness by occasion of the violence and fright shee had taken, as was with speede to be looked into for the safety of her life and that therefore she might be brought to London that night and remayne in some place where shee might have some helpe by physicke and attendance for preservacion and recovery. Which being thought fitting in humanity a letter was written from the Boarde to Sir Edward Coke acquainting him with his ladyes complaynte and requiringe him to deliver his daughter to Mr. Edmondes, Clarke of the Councell, to be brought by him to London and kept in his house until the hearing of the cause. Which Sir Edward upon some exceptions that it was too late in the evening and that his daughter was in no such extremitie forboore to doe, but with promise on his perill he would deliver her at Mr. Edmondes house the next morninge which he did. And after she was brought to Mr. Edmonde's house, wee, hearinge that many friends resorted thither on both sides and doubting some disorder gave directions that she should be kept private untill the hearinge the next day, and two gentlewomen only to be admitted to her companie such as Sir Edward Coke and his lady should choose, which was accordingly done, Sir Edward Coke choosing the Lady Compton and his lady the Lady Burleigh.

“Upon the hearinge of the cause before us on Tuesday Sir Edward by his Councell did first make a recriminacion alledging that his lady had a purpose to carry his daughter into Fraunce and that it was done of purpose to breake of a match with that

noble gentleman Sir John Villiers and accused one of his ladie's servantes for slanderinge Sir John with wordes of disgrace and reproach. Whereupon it was thought fitt by the Boarde to deliver the cause of anything that was impertinent, we all makeing declaracion that we thought that noble gentleman every way a worthie match for his daughter and not doubting he would seek her in a noble and religious fashion, without any forced consent of the mayde and with consent of both parentes, and the rather because parte of her fortune did depend upon the mother's disposinge and therefore directed Sir Edward Coke to twoe pointes, the one to prove the practize of his lady for the transportinge and slander and the other to defend the ryott and force wherewith he was charged. Wherein we found that he made no prooffe of the first allegacion concernynge her purpose to transport the young ladye into Fraunce, neither did we finde the matter of scandell proved to our satisfaction, being avouched only by one witnes and denyed by the partie accused, upon his salvacion and offer of his oath, whereunto was offered by way of prooffe a speech of a very base woman, then absent, of which wee tooke little regard and howsoever they were but wordes of a leude servante (if they had been proved) noe way touchinge his lady, whoe did utterly renounce the same with signification of all honor and respect to the gentleman.

"As for his defence he did not insist upon any warrant he had but said he would justifie it by lawe. Upon all which the Boarde thought fitt that because it appeared that so greate a ryott now in the King's absence and by a person of that quality was fitt to be punished severely, the rather that he called no constable or other officer unto him, but tooke upon him beinge the partie grieved to be *vindex doloris proprii* contrary to all government and for that the King's Attorney beinge presente mayntayned the

law to be the contrary, so that as there was no fitt meanes to admitt him to his justificacion but by a legall process, order was given by the Boarde that the Attorney General should preferr an informacion into the Courte of Starr Chamber against Sir Edward Coke for the force and ryott used upon the house of Sir Edmund Withipole, to be in that courte hearde and sentenced as to justice doth appertain. And to prevent all new occasion of tumult or breach of peace it was alsoe thought fitt that their daughter should be disposed in some convenient place agreeable to her worth and quality untill further order were taken. For which purpose choice was made by consent of Sir Edward Coke and his lady of the house of Lord Knivett neere Staines and in the meane tyme she was disposed to the house of His Majestie's Attorney Generall. And we likewise enjoyned Sir Edward Coke and his lady on the behalf of her friendes to forbear all occasion of violence or disturbance whatsoever as well touching the person of their daughter or any other points concerning that business. But now since this matter seemeth to have a fairer conclusion for that we finde that the writtinges are perfected and not only soe but the parties Sir Edward Coke and his lady reconsiled and the daughter with both their good likeinges sent to live with her father and mother in Sir Edward Coke's house. Which good ende has been much furthered by the charitable endeavour of His Majestie's Attorney Generall. And the informacion and all other proceedinges in the business is suspended and left wholly to His Majestie's pleasure. And so, etc.

“ LORD ARCHBISHOP, LORD KEEPER, LORD TREASURER,  
LORD PRIVY SEALE, LORD VISCOUNT WALLINGFORD,  
MR. SECRETARY WINWOODE, MR. CHANCELLOR OF  
THE EXCHEQUER.”

It may interest those who have followed the tribulations of Frances Coke to learn that in due course she married Sir John Villiers (afterwards Viscount Purbeck), a brother of James's favourite the Duke of Buckingham.

In dwelling upon the conduct of Coke in this affair it has to be borne in mind that he was in disgrace of some standing for offences which had led to his suspension from the Privy Council from June 30th, 1616, until his restoration in September 1617, a punishment very rarely inflicted.

The charges were : (1) A dubious, not to say fraudulent, transaction when he was Attorney-General in connexion with a debt to the Crown from the late Sir Christopher Hatton, Queen Elizabeth's Chancellor. (2) Speeches of high contempt uttered in a seat of justice relating to a cause where the Solicitor-General accused the Lord Chief Justice with "giving too much harte and encouragement" to the said cause, "having too constantly directed the jury, turned them down from the barr, threatened to commit them, examined them by the pole and told them they had been tampered withall." (3) "Uncomely and undutiful carriage in the presence of your Majestie, your Privy Council, and your judges."

The Lord Chief Justice in part submitted himself to the allegations, acknowledging his error, and as to the rest put in a demurrer which was in effect a challenge to the exercise of the prerogative in a manner which under the Tudors had passed muster ; quoting charges against Cardinal Wolsey that certain proceedings in Chancery tended to the subversion of the Common Law. The Council in



presenting his answer to the King thought good withal to add that "before us as well in speech as in action he behaved himself very modestly and submissively."

In the result he was *sequestered* from the Council-table "until His Majestie's pleasure was further known"; secondly, it was ordered that "he do forbear to ryde the summer circuit as a Justice of Assize"; and thirdly, that "during this vacation while he hath time to live privately and dispose himself at home he take into consideration and review his books of Right wherein (as His Majestie is informed) there were manie exorbitant and extravagant opinions sett down and published for positive and good lawe," which he is invited to modify at his discretion. He was further rebuked for styling himself Lord Chief Justice of England, whereas his proper title was Lord Chief Justice of the King's Bench,<sup>1</sup> and—

"having corrected what in his discretion he found meete in the said Reporte, His Majestie's pleasure was that he should bringe the same privately to himself that he might consider thereof, as in his princely judgment should be found expedient, whereunto he was advised to conforme himself in all dutie and obeydience, as he ought, whereby he might hope that His Majestie in time would receive him again to his gracious and princely favour";

to which the Lord Chief Justice made answer that—

"he did in all humilitie prostrate himself to His Majestie's good pleasure; that he acknowledged

<sup>1</sup> He is, however, sometimes styled Lord Chief Justice of England in documents issued by the Council: see November 13th, 1613, and December 7th.

the decree to be just and proceeded rather from His Majesty's exceeding mercie, than from his justice ; gave humble thankes to their Lordships for their favour and goodnes towards him and hoped that his behaviour for the future would bee such as should deserve their Lordships' favour."

It cannot be denied that if the suggested conference ever came off, it must have offered to the cynical opportunities for a most instructive comparison. Either was capable of sinking to the lowest depths of infamy and each had the most easy confidence in his own integrity. We have seen how readily James could justify himself by his own standard of propriety, his self-esteem was equal to any strain on its credulity, and Coke asked for nothing more than to prostrate himself before the deity of his self-worship. It was the historian of the House of Commons who so aptly labelled the "chivalrous loyalty" of Hyde and the "servile patriotism" of Coke.

The case ended comically, as the Lord Treasurer had something more to say "which belonged to the Earles Marshall to take notice of that his coachmen used of late to ryde bare-headed before him which was more than he could anie way challenge or assume to himself," and required him to abstain for the future. To which the Lord Chief Justice replied that the coachman did it for his own ease and not by his orders.

His whole course of conduct in this affair gives emphatic expression to the alternate arrogance and servility which he never failed to display. Great as was his genius as a jurist, his reputation as a man was compact of meanness and cowardice ; his

only stimulus to political action an overweening vanity.

Two further references to the Star Chamber are found in the volumes under review, one in the preamble of a warrant with general directions to all the King's officers, which is only noteworthy for the priority given "His Majestie's High Court of Starre Chamber" over those mentioned; condemning to immediate demolition, "according to his owne expresse pleasure signified and declared *viva voce* in the Starre Chamber," certain buildings which had been erected with bad material in defiance of His Majesty's proclamation, of which the offender had been duly warned.

Before the subject is left a few more words are not out of place. The authority of the Star Chamber was described by Hudson as incapable of jurisdiction "without on one hand offending the supporters of the prerogative by the limitation of its powers, or the lawyers by attributing to it an excessive latitude." It is substantially true, as he says: "It was thus admirably fitted to maintain order against the forces of anarchy, or tyranny against all forms of liberty," and its character was accordingly transformed in contact with the change in the national consciousness in the century and a half between the accession of Henry VII and the meeting of the Long Parliament. In Tudor times, according to S. R. Gardiner, it was "a tribunal constantly resorted to as a resource against the ignorance or prejudice of a country jury," and he adds that in such investigations it showed itself intelligent and impartial. With the increase of public sensitiveness, arbitrary methods and hateful punishments such as those inflicted

by its authority on Prynne, Bastwick, and Burton were common, and popular resentment became one of the gravest sources of the discontent excited by Charles I.

The appropriation of a Court so closely associated with the King's Council to penal purposes of savage severity could not but sully the reputation of the Sovereign as the fountain of justice and make a thing as sacred as the law indistinguishable from an instrument of tyranny. It is worth also recalling that the abuse of the Council's powers became more marked by virtue of the stimulus given thereby to the claims of the Commons. "Government by Parliament," as Dicey says, "and government by the Star Chamber were incompatible, though perhaps no one perceived them to be so at the time of James's accession."<sup>1</sup>

<sup>1</sup> Arnold Prize Essay, 1860, p. 58.



## CHAPTER VIII

### THE ORDINARY COUNCIL UNDER THE STUARTS

It is now proposed to deal with the proceedings of the King's Council to the extent of its ordinary activities, unencumbered by relations with the Star Chamber, introducing citations from the Acts during the years they cover, as seems suitable for throwing light upon the means and methods of its intervention. To that end it cannot be repeated too often that in the justices of the peace, the sole agents, be it remembered, of local administration, the Council to whom they were responsible had a source of information ready to hand and as instruments of interference both effective and well informed.

The trade in woollen goods and raw wool was the most urgent interest of the community, and nothing exhibits the energies of the Council in a more attractive light than the vigilance it displayed in shaping the production of wool and its utilization to the national advantage according to the economic notions of the day. Thus the clothiers of Shrewsbury, Oswestry, and Whitchurch were loud in their complaints of one Robert Charleton and others of the company of French merchants in buying up many hundred pieces, as would otherwise have been brought into local markets, and shipped the same from Aberdovie into France, whereupon the Council saw fit to direct the "forrayner to forbear,

as restrayned for the future by Order of the Board," from buying the said clothes in Oswestry and its vicinity and rest content with their purchase in London, where presumably the trade was more under the eye of the customs.

This order does not seem to have been stringent enough, as a later one seeks to enforce obedience by the infliction of heavy penalties upon its breach. The same offence, however, was committed in the following year, as the Council said, "to the utter impoverishing of many thousands and decay of the saide ancient staple and markett at Oswestrie." On this occasion "for their better information" their Lordships referred the hearing to the Judges of Assize, whose opinion touching the same was in favour of the continuance of the markets, with the restriction that the drapers should not become "merchantes or transporters of the saide cloth" and that the merchants and drapers "and other forriners" should rest content with doing their business in London, to which the Lords of the Council gave their assent, finding the report "soe perfect as there needeth noe further addicions in explanation."

A further interference was pressed upon the Council to insist upon "the dying and dressing of cloathes" here in England for the benefit of the multitude of labourers in the said occupations; but after remitting the point to the consideration of a Committee over which "the Lord Chiefe Justice" of England was asked to preside, the ultimate decision was held over after long debates "for the better avoiding of such inconveniences as commonly do accompany all suddayne changes," a judgment

upon "safe-guarding" which says something for the prudence of the Council.

A complaint of the Company of Silkweavers of London against the importation by merchant strangers of "sondry wares of silke, as laces, rybbandes and such-like contrary to an Act of 19 Henry VII," was referred to "Sir Edward Coke, Cheife Justice of England, Sir Francis Bacon, Kt., His Majestie's Attorney-General, and Sir Henry Yelverton, Kt., His Majestie's Solicitor-General," with instructions to hear the parties on both sides and "upon due examination of all the circumstances both concerning matter of lawe and pointe of conveniency to make report thereof, with their opinion to the end that such further order may therein be taken as shall agree with justyce and equity"; again an order to the form of which no exception can be taken. In such affairs indeed the Council took a view more liberal than that often entertained to-day.

The abuse of their privileges by Dutch Congregations in Norwich and Colchester, which had given much trouble, was also referred to Sir Edward Coke, "who," according to the terms of the reference, "doth already well understand this business, as one who hath taken much paynes in informing himself."

This was not the end of the trouble, as a few months later discontent again broke out owing to the extortionate claims of the Dutch, who at this early stage of national growth already displayed the stubborn spirit satirized in Canning's famous distich :

"In matters of commerce the fault of the Dutch  
Is giving too little and asking too much."

The Council were further concerned about the importation "by marchant straingers into this realme of foraine comodities to an exceedinge greate value, more than is exported by them of the native commodities of their Kingdom, whereby the money and coyne of this realm goes to the exhaustion of its treasure," thus early being troubled about the balance of trade, from which was to spring the mercantilist theory and a whole string of fiscal delusions. Difficulties arose on the same score with the Merchant Company engaged in the export of cloth to Hamburg and with the landing of "sweete wines from the Levant at Southampton," described as a "frontier-town of good consequence in the southerne partes of this Kingdome." Discontent, too, was caused by an edict published at Rouen "prohibitinge all persons as well subjectes as straingers (amongst whom the English are specially named) to lade any goodes in any foraine shippes upon paine of confiscation," which clashed with a recent proclamation for putting in execution the statute of 5 Eliz., "whereby no wyne of the growth of France are to be brought hither in any vessel but in English bottomes." An intimation was accordingly addressed by the Council to the French Government that unless the order was withdrawn the importation of wines into Great Britain would cease. A similar deadlock had arisen in Yarmouth under an order prohibiting the export of herrings "in foraine bottomes," which was got over by suspending the regulation. The Council were constantly invoked to settle the disputes of traders and merchant companies, which, but for their intervention, would have led to the most embittered controversy, the companies strongly resent-



ing the smallest local infringement of their rights. Private trading, outside such as were free of the merchant companies and therefore specially entitled to the privilege, was indeed sternly repressed and every possible vigilance exerted to maintain the companies in the exercise of their powers.

The care of religion was one of the Council's most constant duties ; thus upon information from abroad and particularly from Spain that British ships " do carry over a number of youths and children of both sexes under pretence of learning the language but really to corrupt them in pointe of religion," port authorities are charged to keep a careful eye upon all outward-bound ships with a view to restraining the practice. A curiously worded preamble to the settlement of the true faith in the Channel Islands gives proof of the pride taken by James in the success of his Scottish policy :

" The Kinges Majestie having out of his Christian and princely care settled all the Churches within his Domynions in a uniformity of government, as hath particularly appeared in reducing Scotland to the ancient and approved customs used in the Church since the tyme of the Apostles, proceeds to do the same in Jersey and Guernsey to which the Governors thereof are severally charged to apply themselves."

The due keeping of Lent is a point of habitual concern. Thus in January 1615 the Lord Mayor and Aldermen of London received a letter from the Council which begins with the declaration that—

" the keeping of Lent according to the ancient severity and strictnesse of former tymes hath been

for these late yeares so seriously recommended as well from His Majestie as from this Board, as we shall not neede to lay down any other reasons for its laudable continuance,”

and proceeds with the reissue of former instructions on the subject. In a letter the following year to the Dean and Prebendary of Canterbury we find “ the observation of Lent and fish dayes ” described to be—

“ soe necessary a constitution and soe behoovefull for the commonwealth as we may not neglect any due means for the reformation of such abuses as the lycentiousness of late times hath brought on to the scandal of the Government and the great inconvenience of the State.”

This portentous exordium almost seems to charge the Cathedral Chapter with loose living did not the document end upon a minor key, merely enjoining them to set a good example and to confer with the Mayor and others—

“ trusted with the government of that Cittie, of such course as shall be meet for the imployment of fishermen at sea for the better and more plentiful provision of that place and the contrey thereabouts ; and to certify us of your proceedings therein.”

A very serious complaint is addressed to the three Earls severally Lieutenants of the County of Essex—

“ Wherein has been observed of late yeares such a defecion and falling away in religion which, besides causing grave scandal to decent people in the county, is of weighty public concern, in that

your Lordships in your wisdom cannot but well understand that those maritime counties giving an easy opportunity of descent unto the enemy in case of invasion ought above all others to be sound and inhabited by well-affected people ”—

an ingenious if unexpected conclusion which must have given the Earls concerned anxious cause for deliberation, in no case perhaps greatly eased by the instructions to call into counsel the Bishop of the diocese, to whom, by way of showing the line of least resistance, a campaign against recusants is recommended.

The religious starvation of the people of Pickering is the subject of solemn warning to the Bishop of Bristol, who also held the Deanery of York, to which the parsonage “ of a very great value ” was attached. The parish it served is stated to be very populous, and yet “ they have not for the space of many yeares together had any sermon at all preached unto them.” Subsequently upon a complaint to the Board from the inhabitants of the parish and town of Pickering and having had a very unsatisfactory reply from the Bishop repudiating any call to interfere, seeing that the place was provided with a vicar, the Council summoned the Bishop to appear before them in order to let him see, besides the great obligation they had as Christians, for reasons of State it behoved them to press his lordship—

“ to give a further care of the teachinge so great a multitude (there being four thousand communicants), considering how busye the priestes and Jesuites are these days (especially in those partes) not only in labouring to corrupt His Majesties’

subjects in their religion, but also in infecting them with such damnable positions and doctrine touching their allegiance unto His Majestie's sacred person."

The vigour of their language, of which there was certainly no lack, so impressed the Bishop that he promised the Council to replace the vicar "with some learned and religious pastor who should weekly preach unto the people and carefully instruct them in the pointes of fayth and religion." Whereupon their Lordships accepted his assurances for the time, merely ordering that the preacher should be approved and allowed by the Archbishop of York.

Elaborate arrangements were made at the time by the Council, after conference with the Bishop of Ely, for the confinement of Catholic priests, of which a large number were to be found and for whom the Castle of Wisbech offered a suitable asylum. To this end a further order in due course proceeded upon information—

"that divers Jesuites, semynaries, secular priests and other Popish recusantes with their agentes are received and harboured by some ill-affected persons in the county of Northumberland, . . . and for the further broachinge of their damnable designs doe in manifest contempt of His Majestie's lawe pass beyond the seas and repasse, as also bring in divers popish seditious and prohibited bookes."

Strongest orders were issued for the—

"apprehending and attackinge all such dangerous persons and for the searching of Shippes where any such are embarked and to take security for their appearance in due course to answer their contempt."



Some indulgence was occasionally vouchsafed to recusant prisoners, as we find them now and again set at liberty for three months on the score of ill-health.

Odd cases of conciliar action crop up from time to time. Thus a warrant was granted to one of the messengers of "His Majestie's Chamber" to transport one Henry Whitgrave, "a lewd and desperate fellowe," unto the town of Briell in the Low Countries, there to dispose of him according to such directions as he hath received from their Lordships. Another touches the jurisdiction of the University of Cambridge in the village of Chesterton, where the proctors apprehended some persons of lewd conversation in the house of one Margaret Heckford, a step challenged by a resident gentleman on the ground of extra-territoriality. On submission to the Council an examination of many charters satisfied their Lordships that the proctors had exercised their powers legitimately.

The provision of a sufficient number of men-at-arms was a source of grave concern and pressed upon the executive the need of something like a standing body of trained men, particularly as the policy of the Crown grew more and more calculated to challenge discontent—a defect in the next reign of crushing import, to which the great mind of Strafford was acutely sensitive. He at least took into account that while the King talked more and more about prerogative, Parliament had the counterplay of its privileges to offer him. With moderation in the claims of either side, the Council, which was not without some elements of prudence, might have played a useful mediatory part, but in the circum-

stances could do little to impose restraint on the Sovereign or appease the Commons.

In the years 1613-17, of which we have direct record, it seems to have been the habit of the Council to address themselves from time to time to the Lord-Lieutenants of counties or the municipal authorities of towns in districts where the presence of any military deficiency was reported. Thus a letter to the Earl of Cumberland and Lord Walden, "Lieutenantes of the Middle Shires," takes note that men have never been "ordered into bandes or companies nor mustered nor trayned as in other places" for the curious reason that they were on the border, but "now by His Majestie's happy uniting both kingdoms they are become the middle partes thereof." Wherefore taking to their assistance the Deputy Lieutenants, they are charged—

"to assure suitable and sufficient persons as shall be meete to finde either horse, armour or other furniture for the service of His Majestie and the State, and to make choice of suche, as well freeholders, farmours, owners of land and householders or their sonnes, as shall be thought meete for the use and bearing of the sayd armes and to make an enrolment thereof, by distributing the persons into severall bandes and companies both horse and foote as shall be meete and convenient for the service and to see the same bandes from time to time viewed, mustered and trayned."

A letter of similar import was addressed about the same time to Sir Julius Cæsar, Chancellor of the Exchequer, the Chancellor of the Duchy of Lancaster, and the rest of the Commissioners of

Musters in the County of Middlesex, including the High Sheriff of the County, who are directed—

“ to observe that notyce be taken and inrollment made of all the nombers trayned and untrayned and specially that the Trayned Bandes be kept perfect and complete, by supplying the romes of such officers or other person, as are eyther dead, insuffiycient or removed synce the last musters ; as also by causing the defectes of the armore weapons and furniture to be sufficiently amended and repayred as well in the companyes of horse as foote.”

In May 1615 a much more drastic communication was addressed to the Lord Mayor of London, the preamble of which refers to a previous injunction requiring—

“ all gentlemen and other persons of what quality soever under the degree of a *Lord of Parliament or Privy Counsellor* should in regard of the houses they there hold, contribute upon all occasions to the finding of men, and armes and weapons in all assessmentes made for such or other like services ” ;

and proceeds upon information that divers persons of condition, including “ officers of the Exchequer and other the Courtes of Westminster and of the Custome House,” have refused to serve themselves or to provide material, “ whereby the burden and charge must of necessity lye the heavier upon the rest,” a token, they go on to say, of a “ perverse and unwilling disposition,” and therefore require and authorize his Lordship to call before him such refractory persons and to commend them without further delay or excuse to make present payment “ of the sum due, which if they fail to do to take

good bond of them for their personal appearance before the Council, who will then apply such pressure as they have at command."

By February 1616, in spite of the measures taken two years earlier to impress upon the Lord-Lieutenants of the "Middle Shires" the necessity of providing the district with a military force, disorder had grown to such a height that the intervention of the Council was again invoked upon information that robberies had become so promiscuous as to be the fashion and "outlawes doe daylie increase in an extraordinary manner," of which His Majestie held the cause to be the facilities of escape offered by the proximity of Scotland and Ireland, in which country some "for their misdemeanours and disorderly course of livinge have been confined to dwell." To this information, as conveyed to the Lieutenants, it was added by the Council that "for remedie of this disorder, His Majestie will take it to his princely care that Scotland hereafter shall be noe receptacle nor refuge for these malefactors," and to the same end "we have addressed our letters to the Lord Justices of Ireland to use the like care and industry in those partes," and for the rest, "as a garrison for the repressinge of these disorders for a tyme must be entertained in those partes," the Lord-Lieutenants were enjoined to see "that the soldiers shall be quartered in such places which are most disturbed, and where in judgment and reason without partiality and affection, the good of His Majestie's service shall require."

On April 30th of the same year a minute is recorded of letters to the Lord-Lieutenants of all the counties



of England and Wales and to the Commissioners of Musters in other places, announcing that upon information received since their last addresses, the Lords of the Council “easely perceive the manie and greate defectes in the armes and furniture of foote and how far shorte they are of the equipage and readiness which for service of State is most necessarie and expedient,” and enjoining the proper authorities to put into execution the following directions :

(1) That a general review of all the forces, both foote and horse, should be undertaken with special attention to bringing them up to the proper standard in officers and men.

(2) That effectual and speedy provision be made of good and serviceable arms as shall be meet for the supply of all defects.

(3) That the number of horses which have so long been slighted and neglected as they are now altogether defective may be filled up and made complete.

(4) That all trayned bandes shall be exercised and disciplined at such times and places as is deemed expedient for the sake of the country and the better instructing of the forces in the practice of armes ; to which end all Colonels, Captains, and Lieutenants do perform the duty of their places according to the trust committed to them ; and, lastly, that such provision be made of powder, match, bullets, and carriages as may be thought expedient for the county concerned.

“Of all these things,” so the letter concludes, “we require your lordship to have a speciall care,

as a matter highly concerninge His Majestie's service and whereof He will expect an accompt ; and the returns of a perfect certificate thereof unto us betweene this and the last of October next."

The last minute of the Council relating to the subject is a letter addressed to no less a person than the Lord High Treasurer himself in his capacity as Lord-Lieutenant of the Counties of Dorset, Suffolk, and Cambridge, dated June 16th, 1617, and couched in almost precisely the same terms as that next before given.

With such military forces as were at hand of the foregoing type, the Council seem to have done their best to make them available for the service of the State, or at any rate were not accountable for having refused to take note of the deficiencies which inquiry brought to light.

Although James I may be justly chargeable with having let down the Royal Navy, he was not indifferent to the prosperity of the Mercantile Marine, which under his inspiration received many favours at the hands of the Council. With a view to proper provision for the building of ships, His Majesty was pleased to incorporate by Royal Charter the Company of Shipwrights, and finding that the objects of the charter were thwarted by the "machinations of evil-disposed persons," additional powers were conferred upon the Master and Wardens, and in the event of their failure to obtain the necessary workmen they were further empowered to bring vagrant journeymen and apprentices before the Lord Admiral "to be ordered and constrained to work."

It was largely on account of his interest in

commercial enterprise that he sought the friendship of Spain, to which end, in view of the arrival of a Spanish ambassador with two galleons under instructions to land at Plymouth, the Mayor is ordered by the Council to provide houses for the Ambassador and his suite and to receive them with as much courtesy and respect—

“as may be looked for by an Ambassador coming from so greate a Prince, and to put the trayned soldiers of the town in readiness and to keep a guard there so long as the Ambassador shall remaine.”

The Crown's assertion of an exclusive right to the whale fishing on the coast of Greenland was challenged by Holland. To the Ambassador of the United Provinces, upon his audience at the “Councell Boarde” demanding satisfaction for such losses and damages as the Hollanders had sustained in being interrupted and debarred from their fishing—

“answere was made by their Lordships that the country of Greenland, together with the fishing of the whale upon that coast and all other commodities arising from thence, do properly belong unto his Majesty *jure domini*, his subjects having been the first discoverers thereof, as was made manifest unto their Lordships, and possession taken in the name and on the behalf of His Majestie by erecting His Highnesse Standard upon the place.”

Wherefrom the Council proceed to the inference that without His Majesty's leave or that of those to whom he has granted the sole use thereof it

is not lawful for any of his subjects, much less of strangers, to fish or frequent those waters. The Ambassadors claimed that the said continent was discovered and possession taken by the Dutch in the year 1596, "the same being a long time before the English had any knowledge of the place," as they were prepared to prove by depositions of pilots and mariners engaged in a voyage to the north in that year. But as it was clear that the object of the said voyage was to discover the north-east passage to Nova Zembla, their Lordships brushed aside the validity of the Dutch pretence to any occupation of the country, whereupon the Ambassador admitted he had no direction to dispute His Majesty's title, and only wanted to know the extent of his resolution, whether he meant to appropriate the whole coast of Greenland with its fishing and whether he should take it as a warning from their Lordships and signify so much to the States, and further whether their Lordships would order restitution of the goods seized and compensation for damage, to which their Lordships made answer that His Majesty was resolved to maintain his exclusive right and property to Greenland before all other Powers and States, and if this was recognized by the Government of the United Provinces, "their Lordships would then do their endeavour to procure the Ambassador suche honorable satisfaction as shall reasonably content him."

Relations with France on the point were of a smoother nature, as appears from a report of the "English Admirall," who, coming into a bay on the coast, found a ship there from St. Jean de Luz called the *Grace of God*, of which Michael



Aristige was master, with two Flemish ships. Whereupon—

“the said Michael came aboard the Englishe Admirall before he came to anker and acquainted him that he had been at variance with the two Flemish shippes who had refused to suffer him to fishe there except they might have the whales killed, upon which they were in the end agreed and for the better making of their voyage had resolved to joyne together to beate away the Englishe. Whereupon the Admirall advised him to go aboard his ship and keepe his people quiett until he had ended with the Flemings, which the said Michael accordingly did.”

The Admiral having turned the Flemings out without suffering them to fish, showed more favour to Michael, “being content to graunt him halfe the oyle which hee and his company had made there,” and when the Admiral left he was content to leave Michael there and showed him “divers other courtesies and favours.” In regard to another ship from Rochelle—

“whereof Michaell Schiper was master, the Admirall meeting upon the coast and understanding he came to fish, signified unto him that the place being peculiar to the King’s Majesty by right of discovery, his Highness had granted the sole use and possession thereof unto the Muscovy marchantes under the Greate Seale of England, which he showed him, upon notice whereof the said Michael seemed well satisfied (as he had good cause) and so departed without any further question or taking anything from them.”

A pleasing instance of international comity and good manners, which did credit to the representatives of both peoples.

Peremptory orders were issued prohibiting the cutting of wood used in the manufacture of iron ordnance "to be transported into forraine parts to the greate prejudice and disadvantage of the State," and in connexion with the same object a letter was addressed to the Bishop of Carlisle and other Commissioners for the Mines Royall, enlarging upon the importance of maintaining the supply of material by the production of copper, "which formerlie we stood in need of and could not be provided of but by the favours of diverse foraine princes," and denouncing what appears to have been a strike of two hundred workmen "combined together not to worke or digg unless they might have the prises rayased a fourth part more than formerlie was given," perhaps the earliest description of that type of combination recorded in our history.

The Council also took in hand another large scheme of development by the enclosure of 10,000 acres forming part of the forest of Knaresborough and the distribution of the same amongst the tenants, freeholders, cottagers, and other poor inhabitants as should willingly accept thereof upon such reasonable conditions of rent as should be approved by H.M. Commissioners, the Lord High Treasurer, and the Chancellors of the Exchequer and Duchy of Lancaster, to which it was ordained that special provisions should be attached for the protection of the humbler class of settlers.

Trouble with France claimed attention arising out of the seizure of the *Tiger*, a British ship engaged in

legitimate trade in the Mediterranean, which on reaching Tunis was surprised by a French squadron of four ships, and "after three howers fight," in which the master was slain, carried away with a cargo of money and goods to the value of £8,000. It was further stated that the same man, one Monsieur Martini, agent of the French King's Chamber, had seized another London ship in the port of Gibraltar, for all which an urgent demand for restitution and damages was pressed upon France.

The seizure of a ship and its cargo by the Governor of Dieppe, as a pretended reprisal for losses at sea from His Majestie's subjects, which was aggravated by "an unusuall expostulation" made by the French Ambassador by direction of the King his master, led to an indignant remonstrance dwelling upon the strangeness of "such language from a King which but yesterday did come out of his minoritie, whenas during the time of the King his father, we never were acquainted with wordes of this strayne," whereupon the Governor who had so implicated his Sovereign was sent for to Paris and sharply rebuked by the Council of State for his presumption and violent proceedings, for the information of which an "extrait des Registres du Conseil d'Estat" is entered in the Acts of the Council.

Another act of vigilance for the protection of shipping is implicit in a letter to the Earl of Bath, Lord-Lieutenant of Devon—

"concerning a place upon the top of a hill neare the entrance of the harbor of Dartmouth, called Gallions Bower, where they have ever used and especially in tyme of war and dainger to keepe the sea watch and

where there has always been a compasse for the convenience of natives and strangers to discerne and try the windes, and though the same place be mentioned in a Charter granted to the petitioners and their predecessors by King Henry IV as the ancient and usual place for the sea watch and hath so continued down to this tyme, one John Roope the tenant for life has caused both the compasse and the steppes about the same to be razed down and inclosed this place with a hedge and ditch."

The Lord-Lieutenant is charged to instruct such of the Deputy Lieutenants as are next to the place—

"to call before them the said Roope and upon due information hereof to order that the compasse may be new erected and the sea watch continued as in ancient tyme has been accustomed."

Complaints of piracy, involving the loss of shipping in the North Sea and off Iceland, were referred to the Lord Admiral, upon whose advice "twoe of His Majesty's small ships should be prepared and furnished fourth with the next fishing fleete to Iceland and the North Seas to defend them from pyrates for five monethes." Subservience to Spain did not prevent the British Admiral protesting against the boarding and detention of Kentish ships on the alleged suspicion of piracy.

With some assertion of pomp, the Commissioners entrusted with the return of Flushing, one of the Cautionary Towns, to the Dutch, saw fit to apply to the situation the proud boast of Augustus in regard to Rome: "*Lateritiam inveni marmoream reliqui.*" Implicit claim to an imperial heritage.

A letter addressed to Sir Thomas Edmonds, the



King's Ambassador resident in France, calls attention upon information received to " a shippe at this instant in the Porte of Brest " preparing for a voyage into the East Indies and intended to be used by certain of His Majestie's subjects in co-operation with the French in those parts for the purposes of piracy, in order to frustrate which he is charged to make complaint to the French King and his Ministers and ask them to require of the Governor of Dieppe to make stay of the said ship and company.

Furthermore, two ships lying respectively at anchor off Cowes and in the haven of Portsmouth, intended for a voyage towards the Cape of Bona Sperança, were placed under arrest until further order in that behalf. All which tends to show the constraint upon the freedom of the seas imposed by the conditions of mercantile enterprise then prevailing, while doing much to vindicate the activity of the British Admiralty.

A few minutes of the Council follow of a personal and at times pathetic interest. Thus we have a letter to the Lieutenant of the Tower for permission of Sir Arthur Throckmorton, on his humble suite, to relieve the monotonous hours of his imprisonment by occasional visits to Sir Walter Raleigh, and later the prisoner is granted leave to " goe abroad with a keeper," and to that end his release is signified with an admonition that he " should not presume to resort either to His Majesty's Court, the Queen's or Prince's, nor go into any public assemblies without special license," but that he should use his freedom solely for the business he has undertaken, the miscarriage of which, it will be recalled, led to his sacrifice to Spanish hatred.

Notice of another prisoner is taken in the person of Lady Arabella Stuart, in whose behoof a letter is addressed to Doctor Felton to the effect that the poor lady "having fallen into some indisposition of bodye and minde," it is requisite that some person of gravity and learning be admitted unto her to give her that comfort as is expedient for a Christian in cases of weakness and infirmity, and charging him to repair immediately to the Tower and give her such spiritual comfort and advice as he thinks suitable. Her death was to follow in a few months, as later minutes cover the disposal of her effects.

A list of the Privy Council dated June 1st, 1615, does not indicate any increase in the weight and ability of its members, but is interesting for the note that the appointment of James's unworthy favourite Somerset was cancelled. At a Council held in Farnham Castle, the Bishop of Winchester is sworn a member, August 30th.

The Venetian Ambassador being about to return to Italy, it is disclosed upon the complaint of various persons in London that he "doth refuse to satisfye and pay such debtes and summes of money as he oweth unto them," and though moved thereto by the Secretary of State, "still refuseth to give them satisfaction." Whereupon it is ordered by the Council that the Ambassador shall be once again spoken unto in their Lordships' name, and if he shall not give satisfaction to the petitioners, they shall have leave and liberty to arrest his goods for the satisfaction of their due debts.

Following upon the removal of Somerset from the Council, we have now a minute of letters to twenty-six peers intimating that whereas the King has

resolved "that the Earle of Somerset and the Countess his wife, lately indicted of felony for the murder and poysoninge of Sir Thomas Overbury, then His Majestye's prisoner in the Tower, shall now receive their lawful and publike tryall by their peeres," therefore they are to repair to London at the date given, being some few days before the trial, when they shall hear more of His Majesty's pleasure.

Upon June 9th, 1616, Sir Francis Bacon, His Majesty's Attorney-General, was sworn of the Privy Council, and nine months later "His Majestie, having at the humble and earnest suite of the Lord Viscompt Brackley, Lord Chancellor of England, in respect of his greate age, sickness and infirmity of bodye, discharged his Lordship from the custodie of the greate seale, did commit the same unto the charge of the right honorable Sir Francis Bacon . . . as Lord Keeper thereof, who was sworne accordingly."

A letter to Sir Thomas Gresham, John Evelyn, and John Hayward, Justices of Peace in the County of Surrey, reveals a remarkable story, wherein it is told that a controversy having arisen between the widow of Lord William Howard and the new Lord Effingham in respect of Bleckingley Park, which the lady claimed as part of her jointure, the servants of the one, "his Lordship in person then there," set upon and assaulted the servants of the said lady "in a riotous sort" while they were in attendance upon her, "whereby she was much affrighted and His Majestie's peace disturbed." Whereof the justices are warned to make note and punish the breakers of the peace, taking security that the offence shall not be repeated.

With a view to the more efficient transaction of public business the Council is divided into twelve Committees nominated for the following purposes :

(1) The State of Ireland.

(2) The Household, in respect of which it was intimated to those concerned that His Majesty desired to reduce the charge to £50,000, excepting the stable.

(3) The Navy.

(4) Wardrobe and Robes.

(5) Workes, Castles, and Fortes.

(6) The Booke of Rates, Imposycions, Exportacion and Importacion.

(7) Putting Lawes into execution and concerning Straingers.

(8) Debtes.

(9) Fishinge.

(10) Enfranchisinge Copyholders and improving of Rentes.

(11) Giftes, Graunts, etc.

(12) Grievances in Generall.

It will be agreed a fairly exhaustive list of the obligations of government, and, moreover, the first attempt on record to distribute the work of the Council upon any recognized subdivision of responsibility.

Upon the representation of residents in the four adjoining parishes that "Lincolnes Inn Feildes, being parcell of His Majestie's inheritance, might for their general commoditie and health be converted into walkes to the greate pleasure and benefite of the citty," the King took the proposal "in very gracious and acceptable part," and was the better pleased by the opportunity offered to frustrate the



covetous and greedy endeavours of such as desired to devote these spaces to unnecessary and unprofitable buildings.

The Privy Council having to this day such supervision over the medical profession as is covered by the responsibility to them of the General Medical Council for the administration of the Medical Acts, it is interesting to find that three hundred years ago the President of the College of the Faculty of Physic, by virtue of his functions under the statute, was entrusted not only with the government of all persons practising medicine within a wide area, but was also enjoined to apprehend all such persons as should unlawfully "use and practise" the said faculty, to which end the Council exercised a general oversight and control.

It appears also that the Keeper of His Majesty's game was responsible to the Council, for upon information that poachers "doe in a very inordinate and disordered sorte seek to spoyle the game" (here follows all the methods and appliances used for the purpose), "without any moderation or dutiful regard to spare the same for His Majestie's recreation and sporte," their Lordships proceed to issue a general direction "to all his officers and loving subjectes" to give their assistance to His Majestie's gamekeeper.

James's financial difficulties, owing to the parsimony of the House of Commons, and his reluctance to keep them in session, had by the middle of the reign become acute. The alternative used was an appeal, through the medium of the Council, to the sheriffs and justices of the peace in counties and the mayors of cities and boroughs for such aid

as Parliament had failed to offer. This appeal, a general one circulated to these persons throughout the country, opens with a reference to the lately dissolved Parliament that "there hath not been yielded to His Majesty such supply of his wantes as in congruity of State he might have expected," and proceeds to quote the action of many of the Lords spiritual and clergy, the Lords and others of the Privy Council, with many other Lords and gentlemen of quality, who of their own motion have come to his aid with gifts of plate or money and urging others to do the same. This appeal was subsequently reinforced by others to those counties which had shown slackness, wherein stress was laid that it was people of substance and not the poor from whom help was expected. A special note of anger was reserved to the last for the Welsh counties, reciting how "cheerfully and affectionately" every county within England had contributed to His Majestie's wants, which made their neglect the more inexcusable.

In the same year there ensued a protracted argument with the City of London on what was to all intents a forced loan, which is interesting for the light it throws upon the procedure in such cases. Opening with the message that His Majesty required of the City security under their common seal for a loan of £100,000, he offered them the indemnity of his own counter-security under the Great Seale of England "which they received in good part, praying him to add withall his royal word and promise, which they did esteeme farre more than all the Great Seales whatsoever." On the strength of this assurance the Lord High

Treasurer and the Chancellor of the Exchequer were instructed to give warrant to the Attorney-General "for the makeing and drawing of such bonds as shall be required." Another letter to the City Court expresses the King's anxiety before going to Scotland to have some progress made in the transaction, requiring them to "send for such persons as are known to be of sufficient means and estate to deal with as quickly as possible," warning the refractory, "altogether voyde of reason, affection, or duty," that their names will be certified to us that notice may be taken of them. A further letter tries to meet the case of certain persons who expect the security of the City as well, and directs the Lord Mayor and Aldermen "to give order accordingly." In the cases of the refractory reported to the Council where the efforts of the City were unable to succeed "without our aid," some abatement being asked for, the Council find it *strange* that such a request should be made.

In about four months after the negotiations opened, the Council complain that "soe slow is the performance of what was promised that there is wanting of that summe neere twenty thousand poundes to the exceeding prejudice of His Majesty's service," and go on to say that they expect no further excuse and pretence but service and performance according to the direction of the Board with such diligence and expedition as may redeem former omission and neglect. In pursuance of this admonition, pressure seems to have been applied with some stringency, as several contumacious citizens were ordered to report themselves to the members of the council with the King

in Scotland, to "receive such order as they may think meet to direct upon the hearing of the allegations," which they assure themselves will be found but shifts to frustrate the service.

On July 15th, just six months after the matter was mooted, the Council deliver an ultimatum to the City authorities charging them to fix a date in August "for the redeeming of all former omissions," when those who have hitherto been so sparingly dealt with will be made to understand their obligations.



## CHAPTER IX

### APPROACH TO MODERN IDEAS

THE charge of Ireland is a constant concern of the Council at this epoch and a source of trouble in many ways. Thus we find the Lord Deputy directed to restrain the efforts of the Irish to "overthrow" the new plantations in the maritime part of Munster, where three towns had been created and peopled with English who were employed in ship-building, ironworks, and other "commendable" occupations. "Experience," they say—

"having now taught us what excellent use the lumber of that kingdom is for building of Shippes, wee must not forget, considering the great decay thereof in this kingdom, that some order may be taken for the preservation of such woodes as lye conveniently neare the sea or any navigable river."

The City of London having undertaken the plantation of part of Ulster, two representative citizens are sent out to the Lord Deputy, who is asked—

"to shewe them as much favour as you may afford to persons of their quality that are willing to leave the citty and their own affairs for the advantage of the public in partes so remote."

The Council refer to the Lord Deputy for his information and summary punishment a "lamentable complaint" of Ulster King-at-Arms against Sir William Stewart, who, being angered by a

point of precedence being given against him, entered Ulster's garden and "did so cruelly assault him that he received many woundes and irrecoverable maims, his sight being exceedingly decayed through the losse of seven or eight pounds of blood, the use of his right hand and arme utterly lost," and in general so debilitated that in his physician's opinion "he hath no hope of recovery" and must end his days in "continuall weakness and discomforte, to the utter overthrow of his estate and famylie." A signal instance of an Irishman's faculty for inflicting chastisement out of all proportion to the offence. These questions of precedence, however, appear to have been vehemently disputed, as was the case between Lord Kerry, commonly called the Lord of Lixnawe, and the Lord Slane, to the former of whom the coveted position was assigned.

Articles of great length, described as "fitt to be observed for the settling of Wexford betwixt the natives and others," seem to have been drawn up with every desire to act equitably towards all the interests involved and to avoid as far as possible anything of a confiscatory nature. By letters to the Lord Deputy in relation to the settlement of Ulster he is reminded that "His Majesty hath not anything so muche in his princely eye and most Christian harte as the advancement of the Churche, which must be the meanes in good time to bring on civil obedyence," an observation from which we may conclude the removal of the Catholic population was within the ambit of the princely eye, a design that finds some support from an order issued by the Council a few days later to certain Lord-Lieutenants to find soldiers for service in Ireland. A sensible

admonition is addressed to the Lord Deputy for the preservation of Irish timber for the use of the United Kingdom.

The practice of sending the sons of Irish noblemen and leading gentlemen to England for some part of their early and impressionable years was extensively followed, with what seems to have been good results. Interesting evidence is afforded in this connexion by a letter of the Council to the President of Magdalen College, Oxford, expressing the King's care "to have the youth of Ireland as well the nobilitie as the principall gentry trayned up in this realme to civilitie and religion as far either instruction or example may serve to infuse the same," and commending to the President's custody one Brian O'Rourke.

The planting of Connaught with "Englishe" is also advocated, to which end the supply of sufficient ministers or men able to preach is considered necessary. The supply of munitions at the same time is not overlooked, as we find Sir Tobye Calfeild (note the mutilation of a well-known name), Master of the Ordnance, charged with a large consignment.

The transition which the Constitution underwent at this stage is well summarized by Dicey.

"In 1614," he says, "James attempted to manage the Parliament. It took no great acuteness to foresee that the assembly which the Crown found it necessary to cajole was on the point of becoming the sovereign power of the State. A revolution, it was manifest, drew near; nevertheless the plan of ruling by the Council lasted out James's time, and when in 1625 Charles mounted the throne the Council was still an assembly with the same powers

and the same constitution as it had possessed in 1603.”<sup>1</sup>

It was with great reluctance the Council agreed to some of its provisions, but when the French Treaty arising out of the King's marriage was submitted, they consented not merely to its form but also, a necessary consequence, to the suspension of the laws against recusants. On James's death the new Privy Council was in most respects unchanged; the Catholic Lords Wootton and Baltimore were included, and Sir Humphrey May Chancellor of the Duchy, a man of some ability and of a very accommodating disposition.

The repudiation of the promise to discontinue the penal laws met with the acceptance of the Council, who thus became a party to Buckingham's treachery and disloyalty to the assurance given the Queen for the protection of her co-religionists; they also seem to have acquiesced in Charles's resolution to throw down the glove to Parliament by an immediate dissolution, though when the Council met at Woodstock it was his manifest intention to convince them that he would take no serious step without their advice.

Their first resolution was that a new fleet should be sent to the succour of Rochelle, but they showed some independence when, upon sixteen Peers having refused to submit to the forced loan, they declined to recommend extreme measures against them. Some members, however, accepted places on the Commission charged with enforcing the loan, and their prestige no doubt promoted its partial success,

<sup>1</sup> Arnold Prize Essay, 1860, p. 60.



but many counties offered a steady resistance, to which some of the Commissioners were themselves parties. They had the courage to share the national dislike to the French war and many of them were outspoken in expressing it. Even Buckingham, to the astonishment of the Council, advocated the calling of a Parliament. The bewildered councillors supported the King in his refusal, but were at a loss when the alternative means of raising money came to be considered. Buckingham then shifted his ground and advocated a standing army, to which the majority of the Council gave a certain support. The debates were prolonged from day to day, till the desperate advice was at last reached to withdraw from all foreign entanglements. The advocates of arbitrary government veiled their discontent behind a resolution of the Peers that the King and Council had power to commit *upon just cause*, thus leaving the last words open to a judicial interpretation ; but Lord Keeper Coventry went so far as to say, " For the Privy Council to commit without showing cause was only in accordance with the ordinary law," but he hesitated to put this proposition to the vote, all which tends to show how slow definition was in reaching a fixed point.

Meanwhile, the Commons had brought the issue to the touchstone by the Petition of Right, over the exact purpose of which Charles was haggling with the judges, and on the whole question being discussed at the council-table Charles was advised to make reply :

" Since both Lords and Commons have severally with dutiful respect to us declared their intention

not to lessen our just power or prerogative as their Sovereign, we do as freely declare our clear intention no way to impeach the just liberty of our subjects ; and therefore the right being so happily settled between us, we do freely grant that the petition shall in all points be duly observed."

If the spirit and intention of these words had governed the future, how easily might war and discord have been averted ! In the trouble arising out of tonnage and poundage the Council directed that assistance should be given to the Custom House officers in the execution of their duty, and that those who resisted them should be imprisoned until this Board give the Order, *or that they may be delivered by order of the law*, an indication of their decision to conform to the requirements of the Petition of Right. Those who refused were summoned before the Council, and one Chambers was committed for contempt to the Marshalsea for saying, " Merchants are in no part of the world so screwed and wrung as in England. In Turkey they have more encouragement."

A Royal Proclamation for the Peace of the Church, cleverly designed to conciliate all parties, was approved by the Privy Council and subsequently obtained the assent of the whole bench of bishops, in acknowledgment of which Charles restored Archbishop Abbot to some favour, inviting him to resume attendance at Council.

The Council next assented to the King's declaration, of which the Commons were to be informed, that the Custom House officers act upon the instructions of the King and Council and are not responsible to Parliament, and urged merchants to pay the tax,

the refusal to do which had suspended the whole trade of the country. In their efforts to relieve the silk weavers, one body of merchants after another were summoned before the Council, and vainly entreated or threatened to take the goods off the weavers' hands.

With all these causes of discontent, the action of the Privy Council in social matters was still based on the obligation of governors to protect the helpless mass of the people, and on Wentworth's accession to the Council, a series of measures ensued aiming at the benefit of the people in general and the protection of the helpless against the self-interests of the powerful. Thus, the Council having granted a new charter to Huntingdon, Cromwell, though nominated one of the three justices for the borough and consenting to the change, came to see in it a means of oppression to the poor and appeared before the Council to justify his objections, which were sustained on the matter being referred to the arbitration of the Earl of Manchester.

On being approached by the King as to the help to be given to Gustavus Adolphus, the Council recommended him to call a Parliament, while a large majority were in favour of the King's terms ; but negotiations failed owing to Charles's objection to fuse his particular interest with the larger interest of German Protestantism, in which he was probably right.

On the motion of Laud the Council gave orders for the demolition of the houses that had grown up against the walls of St. Paul's, some on land belonging to the Church, granting sufficient compensation.

The first steps towards Puritan emigration were arrested by Order in Council, but finally allowed on the condition, due to Laud, of attending the daily service of the Prayer-book.

The means of equipping a fleet having now, as it seemed, been provided by the levy of Ship-money, it was given a suitable start with the Council's approval of Charles's claims to the Sovereignty of the Sea, but the object to which it was to be applied and the prospect of raising it were alike uncertain. The Sheriffs were finally ordered to make the assessments, and the Council adhered to the enforcement of their duty, in spite of a flood of protests and complaints. The opposition was particularly fierce in North Oxfordshire, the residence of Lord Saye and Sele, where the constables averred they had no authority. The Sheriff forwarded such answers to the Council and suggested that their authors should be called before them, but they were in no hurry to come into contact with such sturdy malcontents.

The Council's opposition to emigration took the shape of refusing leave, without special licence, to those of sufficient means to be rated on the subsidy books and requiring from everyone a certificate of conformity from the minister of his parish.

When Charles laid his Scottish troubles before the Council he abstained from asking their advice, the confession relieving his spirit for the moment. Bankes, the Attorney-General, announced his method, the ultimate weapon being a naval blockade.

Charles then went so far as to appoint a Committee of the Council on the subject, one that was so hopelessly divided as to furnish no help. The



efforts to obtain money for the purpose ended in complete failure, and an oath of Wentworth's invention binding Scotsmen residing in England to renounce the Covenant was equally futile. The only hope left was a forced loan from the merchant princes of London, but on the first summons of the Lord Mayor to appear before the Council, he came with so few aldermen that he was ordered to return with a full complement, when they were told the King expected a sum of £100,000: on declaring their inability to find such a sum they were given no choice, and Cottington added that they should have sold their chains and gowns before making such a reply. Coventry and Manchester signified their dissent, and the rest could offer nothing but the wildest suggestions.

In the dispute between Wentworth and Loftus, whom he had suspended, the Council took Wentworth's part and ordered the prosecution of Loftus in the Star Chamber, and a Committee of eight councillors under Wentworth's control took up the Scottish problem, and upon his advice agreed that a Parliament alone could deal with the crisis, in which Charles concurred.

The City having granted the paltry sum of £10,000, Charles appealed to the Council. Wentworth led with £20,000, Coventry, Manchester, and Newcastle followed with £10,000 each, and by Christmas a total of £200,000 was reached.

On the meeting of Parliament it at once espoused the Scottish cause, and a majority of the Council sided with the King that a dissolution was the only resource. The efforts to obtain Ship-money or Coat-and-conduct aid were fruitless, and the

Council had to proclaim itself bankrupt in policy and even reached the pitch of a proposal to tamper with the currency. It was further distracted by the news of the Scottish invasion, and could only propose the impotent expedient of a Grand Council of Peers to consider the situation, and was actually taking measures to strengthen the fortifications of Portsmouth as an ultimate refuge. Charles, however, who was always brave, did not share the fears of the Council, and the situation in Yorkshire for a while lent some confirmation to his hopes.

After their last display of cowardice there was nothing more to be got out of the Council, of which for the short time left to him Strafford was the only vital figure, but apart from the desperate state of his health, he was a doomed man from the outset of the Long Parliament. There were none indeed to do him reverence. During the first session Hyde and Falkland were practically at one with Hampden and Pym. When the Star Chamber went down in its iniquity under a load of public execration, its fall was equally gratifying to the four, for it was Clarendon himself who recorded the most indignant protest against one of its last acts of infamy in his denunciation of the penalties inflicted on Prynne, Bastwick, and Burton.

“ They were of the three professions which had the most influence on the people, a divine, a common lawyer, and a doctor of physic, none of them of interest or of any esteem with the worthy part of their several professions ; yet when they were all sentenced and for the execution of the sentence brought out to be punished as common and signal rogues, exposed upon scaffolds to have their ears

cut off and their faces and foreheads branded with hot irons, . . . men began no more to consider their manners, but the men ; and each profession, with anger and indignation enough, thought their education and degree and quality would have secured them from such infamous judgment and treasured up wrath to come."

The Grand Remonstrance foreshadowed the end when the Commons demanded that the King should employ "such ministers as Parliament may have cause to confide in," adding thereto, "without which we cannot give His Majesty such supplies for the support of his own estate nor such assistance to the Protestant Party beyond the sea as is desired." As Pym and Hampden well knew, there was nothing revolutionary in this request, for which there were plenty of precedents in the claims of mediæval Parliaments to have a share in the nomination of the Council, although the authoritative rule of the Tudors had to some extent effaced the memory of these first essays towards a limited monarchy. The King's reply curtly asserted his right to choose his ministers, "always proposing to employ persons of ability and integrity."

Nothing could have been more complete than the sudden collapse of the whole machinery of government known to a generation. With a startling alacrity the initiative passed from the Council as the instrument of the King to the Commons as the voice of the people. The pale phantom of a Council maintained for a while a flickering existence at Oxford, but at the Restoration it no longer bore part in the balance of constitutional forces ; from that date English political atmosphere took on a

distinctly modern complexion, and when in 1688 the pinch came, the issue lay between King and Parliament without any intermediary. The result attained led up by easy stages to the Act of Settlement, which established the two principles that the King acts only through his ministers and that they are responsible to Parliament—provisions embodied in the requirement that all public business should be formally done in the Privy Council and all its decisions signed by the members. It was the abolition of the Star Chamber that made these developments possible ; by the excision of its extraordinary judicial powers, of which the Chamber was the outstanding abuse, the existence of the Council as a menace to liberty ceased ; its teeth lay there, and once these were drawn it fell into its proper place as an advisory body ; finally, for its more obvious uses, to take the place of the modern Cabinet—the natural evolution of “ committees for the State ” and other specially selected consultative bodies which throughout the Council’s history took shape from time to time.

Shorn of its proclivities to dangerous temptation, the Privy Council resumed its ancient character and status, but in use, as an instrument of government, it underwent some changes. The general sense inclined towards the substitution of a smaller body for the whole Council as the actual deliberative vehicle. Charles II, whose sagacity was rarely at fault, delivered the opinion that such an assembly was unfit for the secrecy and despatch which are necessary in great affairs, and Parliament shared his views on the definite ground that with a smaller executive the responsibility of ministers could be



more effectively enforced and irregular lapses brought to book. There was no disposition to curtail the King's right to choose his own advisers, but to narrow the area of choice was some guarantee for wisdom in its exercise.

Charles disliked long debates in Council and made no secret of his feelings, though he showed a marked aptitude for handling the subject when his own intervention was in request. It was in connexion with the Navy that this aptitude was most effectively displayed, and the Council were urgent in support of his efforts. Herein he was following in the steps of Cromwell, from whom he inherited a debt of a million and a quarter in respect of naval expenditure. As stated by Professor Callender, of the Royal Naval College, "Charles more than any other ruler of England since Henry VIII was the true friend and well-wisher of the service." Pursuing the great exemplar of Blake, under whom the first edition of the "Articles of War" began with the impressive preamble "Whereas it is upon the Navy under the good Providence of God that the safety, honour and welfare of this Realm do chiefly depend," the King in Council not only concerned himself with the constructive side and organization of the higher command, but, as became a King who was the intelligent patron of science, he and his Council, acting in conjunction with Sir Isaac Newton and Christopher Wren, induced the latter to erect within the royal gardens at Greenwich a house for Flamsteed's quadrants, now known as Greenwich Observatory, where, as Professor Callender puts it, "the face of the heavens was converted into a clock-face for mariners with the constellations as index

figures and the moon as moving hand." As recently said :

" Charles II was strongly interested in the art of naval design, and for an amateur not unskilled in it. He and James were perhaps the two men in the kingdom who most appreciated what a strong navy meant to England and how necessary it was to furnish one ; not only by sufficient expenditure to secure quantity, but by attention and intelligent application to secure quality." <sup>1</sup>

At the same time, following on lines laid down by Drake in the preceding century, the King and Council elaborated a comprehensive scheme for the selection and training of officers and for their examination in every branch of professional competence.

Professor Dicey applauds the King's dexterity in dealing with the Council by making use of one of its time-honoured characteristics.

" Since," he says, " at all times the Council had acted through Committees, the King could without any innovation form a special committee or (to use a term in use even in his father's reign) a ' Cabinet ' to which alone the secrets of his policy were confided." <sup>2</sup>

This body in substance superseded the rest. The whole Council were either never consulted or merely summoned as a matter of form to learn the decision of their colleagues. It was a feature of his design so to increase the number of titular councillors as to justify the employment of a select few for actual deliberation and advice. On one occasion, while

<sup>1</sup> Hilaire Belloc, *James II.*    <sup>2</sup> Arnold Prize Essay, 1860, p. 65.

thanking the councillors for all their good advice in the past, he refers to the great number of the Council, which had forced him to use a smaller number in a foreign committee "and sometimes the advices of some few among them upon such occasions for many years past." This committee was understood to refer to his first effort in this connexion, which earned the ungrateful designation of the "Cabal," but as time went on experiment hardened into practice, till by the end of the reign the germ of Cabinet government was established.

The most conspicuous, if unsuccessful, effort in this direction arose through the King's invoking the aid of Sir William Temple, by whose ingenuity a scheme was devised which has been described as an "attempt to combine the advantages of the old system of government by a Council with the merits of the modern plan of government by a Cabinet formed from the principal parliamentary leaders of the day." The new Council was to be limited to thirty persons, and so far the plan did not go beyond a revision of the Tudor Council, but its originality lay in three new ideas : first, the representation of prominent factors in national life, thus the Bishops are charged with the care of the Church, the Lord Chancellor and the Lord Chief Justice are to "inform the King well of what concerns the law"; second, the admission of influential members of Parliament; third, that the body should derive weight from its property at large. In Temple's own words :

"It appeared necessary to take into the Council some Lords and commoners who were of most

appearing credit and sway, without being thought either principled or interested against the Government, and mix them up with others of His Majesty's more general choice, for the making up of one half of the Council, while the other half were ever to be the present chief officers of his Crown and Household. . . . But one chief regard necessary to this constitution was that of the personal riches of this new Council, which in revenues of land and offices was found to amount to about £300,000 a year, whereas those of the House of Commons are seldom found to have exceeded £400,000. And authority is observed much to follow land, and at the worst, such a Council might of their own stock, and at a pinch, furnish the King so far as to relieve some great necessity by the Crown."

It is interesting to recall that this very occasion had arisen in 1639, when the Council, headed by Strafford, made a large contribution to the King's necessities in order to meet the crisis of the Scottish rebellion.

Professor Dicey is right in showing that the real value of the effort lay in turning men's minds to the evolutionary process by which a truer grasp of the realities of political life was at last able to adjust the Constitution to the needs of the time.

The plan was, as we know, a complete failure, and after two years its author retired from office, mortified and disenchanted. He attributed his failure to the duplicity of the King and the admission of Shaftesbury to the Council Board, though he need not have gone further than the last-named's restless ambitions to account for the collapse of the scheme ; but if the appointment of members for the sake of their parliamentary influence formed part of it, no



blame can attach to the King for the inclusion of Shaftesbury. The cause of disaster was deeper to seek, for while containing features of promise for the future, the project was too much hampered by the dead hand of the past, not to speak of the prejudice created by its author's own admission that it was meant to counterbalance the influence of Parliament. It was only through the ampler vision of ministerial responsibility to be hereafter attained that conflicting principles were at last to make way for a salutary conception of parliamentary government, rooted in sound theory and adapted by the pains of birth to the permanent requirements of State.

Vagueness as to the tie between Council and Cabinet and the recognized limit of either's activity had still to wait many years for definite correction. The revolution of 1688 under one aspect, noted by Mr. Trevelyan, viz. the revolt of the squires against the Privy Council, accelerated the process, through, as he describes it, their emancipation for nearly two centuries from all effective control in social and economic, no less than in political and religious matters. The Privy Council, as a whole, had ceased to be responsible for the Crown's political acts, but during the period of transition it still remained the only body of royal ministers known to the Constitution, and on great occasions, such as the signature of the Treaty of Utrecht, was convoked in a body, as is still the case at the solemnity of an Accession or the announcement of the Sovereign's marriage.

A writer of 1701 declares that "in setting the seal to foreign alliances the Chancellor has a safe rule to follow ; that is, humbly to inform His Majesty

that he cannot legally set the great seal to a matter of that consequence unless the same be first debated and resolved in Council." As late as 1711 an objection was made to the term "Cabinet Council" as an expression unknown to law, and Lord Peterborough exercised his wit at the expense of the two by the description of the Privy Council as a body "who were thought to know everything and knew nothing," and the Cabinet Council as those "who thought that nobody knew anything but themselves." We are still reminded of this dualism every Sunday when we are asked to pray that the Lords of the Council may be endued "with grace, wisdom, and understanding." Dicey sums up this catalogue of contradictions with the remark :

"The Privy Council has the same political powers which it had when Henry VIII ascended the throne, while it is in reality composed of persons many of whom never have taken part or wished to take part in the contests of political life."

With the end of Queen Anne's reign we reach the tense hour of the Council's last authoritative intervention as a body in a supreme issue of State. No more dramatic episode or one charged with graver risks has its record in English history. Bolingbroke had just got rid of Oxford and was credited with the design of trading upon the Queen's feebleness and her reaction at the last hour to the ties of blood to bring about a Stuart restoration by calling her brother to the throne. On the night of July 27th, 1714, the Queen, who was visibly drawing near the end, rallied her failing forces in order to preside over a Cabinet, when, to Boling-

broke's chagrin, the Treasurer's wand was put into commission. On the morning of the 30th the Council were sitting at the Cockpit when the state of the Queen's health necessitated their repairing to Kensington, where Her Majesty lay dying. Thither the Dukes of Somerset and Argyll with a number of Whig Peers had also hastened, where they were met by the Duke of Shrewsbury, who was hardly regarded as a Whig. The three entered the council-chamber and so constituted a meeting of the Privy Council, upon which Sir William Anson observes: "This, if not the last, is at any rate a very exceptional exercise by the Privy Council of deliberative as well as executive powers." The Queen's physician declared that even in this dark hour she might still be spoken to, upon which they ranged themselves by the bedside of the dying woman, whose clouded vision presented its last challenge to insensibility. Here, whether the situation was too searching for chicane to live or hesitancy born of some last scruple assailed his conscience, Bolingbroke's courage seems to have failed, and he made no protest when the Queen in a momentary access of vigour placed the staff in Shrewsbury's hands, thus defeating the other's deep-laid schemes. The urge to the Queen's action was never revealed, as she forthwith passed into impenetrable silence and on the morning of August 1st, at seven o'clock, breathed her last.

The minute of the Privy Council which registers the event is still there for the curious reader, with imagination enough, to evoke the emotions beneath the surface excited by such a drama. All the elements of tragedy were united to give the moment

the scenic touch which fixes passing passion in an immortal frame. As one famous in English political life once wrote to the author of this book: "What a world of ambition and anguish lurks behind those formal words!"

It beggars speculation to ask the question what would have happened if that stroke had been successful. With all his brilliance, Bolingbroke suffered from cardinal defects of character, and though Disraeli places him in the line of heroic spirits, beautiful and swift, which begins with the name of Falkland and closes with that of Canning, there was some moral flaw about him that tended to make success equivocal and failure disastrous. His shining achievement was the Treaty of Utrecht, his crushing defeat the abortive *coup d'état*. The mistrust he inspired was apt at a crisis to react upon his own self-confidence with damaging effect, as his inaction at Kensington on the day of trial indicated, when, daunted by the weight of opposition, he renounced the struggle, though as the Council was preponderantly Whig he should have been prepared for the inevitable reply to his challenge.



## CHAPTER X

### COLONIAL PERIOD (I)

WITH the accession of George I, hampered by his linguistic inability to preside at the Council Board, the Cabinet, which was to all intents and purposes a Committee of the Council, succeeded to the full-fledged inheritance of that body and henceforward enjoyed its prestige and authority ; but though the Privy Council was thus side-tracked from practical concern with the principal machinery of government, it yet retained a large share in departmental administration. For a hundred years the nascent interest of colonial enterprise had claimed its close attention, and throughout the greater part of the eighteenth century the Council continued to guide and stimulate colonial expansion and development with all the energy and resources at its disposal, until the blunders of George III and his advisers precipitated the fatal conflict with the American settlements.

It was the privilege of the present writer while he was at the Privy Council Office to initiate and carry through the story of this development as preserved in the archives of the Privy Council. The pecuniary aid of the Carnegie Trust for the Universities of Scotland was secured at the instance of its Chairman, the late Earl of Elgin, then Secretary of State for the Colonies, and the American Historical Society, the Canadian Archives Department under

Professor Doughty and Mr. H. E. Egerton, Beit Professor of Colonial History in the University of Oxford, also contributing, the Treasury agreed to defray the expense of printing and publishing a limited number of volumes.

The subject was introduced to the Editors, Messrs. W. L. Grant and James Munro, in the following terms :

“ It is proposed to prepare for publication those parts of the Register of the Privy Council between 1613 and the Declaration of American Independence dealing with Colonial affairs in what are now the United States, the Dominion of Canada, Newfoundland, and the West Indian Islands.

“ The indices of the Registers, which are comparatively full, have recently been classified and bound up, and marks have been placed in those parts which most obviously call for reference.

“ It may well be that they include matter not of such general interest as to justify publication, but the editors, in scrutinizing the contents of the Registers from this point of view, will bear in mind that in transatlantic opinion the personal factor in many of the transactions recorded may have an interest out of proportion to the significance of the circumstances.

“ The series as a whole has been described by a competent American authority as ‘ the most valuable single collection of documentary evidence for a study of the policy of Great Britain towards the Colonies that we have,’ and it is from this point of view that the publication has been undertaken.

“ As a general rule, therefore, the criterion which the editors will apply to the inclusion of any particular document is its value in illustrating the action and intention of Crown Government on the

one hand, and on the other the development of Colonial ideals and institutions through the medium of local opinion and indigenous sentiment.

“In addition to the selection of the material to be published, the functions of the editors will include the supply of such notes as may be required to elucidate the text and the preparation of prefatory notices to be prefixed to each volume that is issued. These notices should be in the nature of a rapid summary of the contents of the volume, giving prominence wherever possible to the evolution of such principles of organic growth and stream of tendency as may be traceable in the documents under review.”

First efforts under Elizabeth, in spite of the sanction of great names, had come to naught. Raleigh in Virginia and Gilbert in Newfoundland had dismally failed, but by the end of James's reign, Virginia had been founded and become a Crown colony, the Puritans had settled themselves in Massachusetts, the Bermudas were a flourishing settlement, and the occupation of St. Kitts in the teeth of French opposition was the beginning of the West Indian Empire.

In his preface to the first volume Mr. Grant states : “The present record of its activities gives a most favourable impression of the Council as a governing body, anxious to help, willing to take advice, free from preoccupations.” It did not shrink from modifying its opinions upon fuller information or making handsome apology to a man unjustly blamed, while even to a colony like New England which lay under suspicion of disloyalty, justice and even favour was shown. Questions came before the Council by way of petition either

of individuals or of corporate bodies, and it was thus largely concerned with cases of private interest. Matters of public importance were not overlooked, and points of importance dealing with the transportation of criminals and of political offenders, with boundary disputes and charges against State authorities and efforts towards inter-colonial agreements in Indian affairs, were examined without stint and as a rule settled with praiseworthy exactness. Light is thrown on colonial justice by suits touching wills or fraud on the part of the agents of absentee landlords, and on the course of colonial trade by appeals on disputes with the officers of the Customs, and for redress on the unjust seizure of ships or the detention of goods by any of the powers competing for colonial pre-eminence.

It is in the reign of Charles II that the direct interest of the Crown becomes prominent, and here injustice has been done to him, for if he sometimes yawned in Council, as Pepys would have us believe, he was unfailing in attendance. "The King's Most Excellent Majesty" figures at the head of those present much more frequently than in his father or grandfather's time, and clauses in the letters sent out to Governors often have a shrewd word or two offered by the Sovereign himself.

The increase of business led to its distribution among subsidiary bodies, thus a Council of Trade was sitting in 1668, and on July 30th, 1670, a Council of Plantations, which showed great activity and to which numerous matters were referred by the Privy Council. In September 1672 these two bodies were united, but in December 1674 their commission was revoked and authority again centred in the



reorganized Committee of the Privy Council. This Council of 1672 had been extremely efficient, and to the instructions for colonial Governors prepared by it under the guidance of Shaftesbury and Locke was largely due the scheme of plantation control followed by successive administrations until the American Revolution. From 1675 to 1696, when a separate Board of Trade and Plantations was appointed, "the Right Honourable the Lords of the Committee for Trade and Plantations" are the real administrative centre of the British Colonies, and the records of the Council largely consist of references to and reports from this body.

The greatly increased interest in colonial affairs after the Restoration is very striking, as under Charles II it flowered into a definite colonial policy, the pursuance of which is regarded as an essential part of England's greatness. The settlement of the Carolinas, as their name implies, was a feature of this period, and no member of the Privy Council displayed greater energy than the King in promoting the scheme. The original associates in the task were the Earls of Clarendon and Craven, Monk, Duke of Albemarle, Sir George Carteret, and Sir William Berkeley, but after a first failure it fell to the lot of Ashley, aided by his friend and secretary, the philosopher Locke, to rejuvenate the design and place it upon a solid foundation, to which Locke contributed a masterly document defining the constitution of the new States with elaborate care. Professor C. M. Andrews, of Yale University, pays Ashley the highest tribute :

"Despite so many apparent failures, Shaftesbury must be considered one of the greatest among our

colonial founders, and one who in his management of colonial affairs in England placed the British colonial policy on a broader and more comprehensive foundation than had hitherto been laid. To him more than to anyone else do North and South Carolina and the Bahamas owe their being.”<sup>1</sup>

In this connexion we have the testimony of Locke himself, who writes: “I was witness to a deed bearing date October 1669 between the Lord Keeper on the one part and Lord Ashley on the other part,” which it is evident referred to the settlement of Carolina, thereby committed to eight Lord Proprietors, of whom Lord Ashley was the most prominent, when Locke, acting as secretary, was able to give the colony the benefit of his energy and experience.

“To Locke,” says Dr. Williamson, “was entrusted the drafting of the scheme of government and constitution, and no colony was ever started with a more elaborate provision of social, political, and religious organization, the original text of which in a small vellum-covered volume of 75 pages is still preserved among the Shaftesbury muniments.”<sup>2</sup>

Yet though the Restoration Monarchy had an undoubted insight into trade and policy and the Council saw the part the Colonies were to play in their own development, the intelligence of either must not be exaggerated. Progress is just as much due to the growing importance of the Colonies as to any superior wisdom of Charles or Clarendon. This is illustrated on a close study of the Navigation Acts, the rigid product of mercantilism or, as many hold,

<sup>1</sup> Andrews, *Colonial Period*, p. 53.

<sup>2</sup> *Behind my Library Door*, p. 94.

the final embodiment of an outworn theory. Its essence as applied to the Colonies of the day lay in the pact by which the Colonies were guaranteed the English market and restricted to it, not unlike the system the application of which to the Empire to-day is the doctrine of one school of Imperialism. One of its immediate effects was the Act of December 1660 "for prohibiting the planting, setting, or sowing of tobacco in England or Ireland," upon the express grounds of protecting, maintaining, and keeping up the Colonies and Plantations as a market for the consumption of British goods.

It must always be borne in mind that the key to the relations between Great Britain and the new settlements lay in the understanding that they were "Plantations," called into existence to further the commercial interests of the Mother Country in return for its fostering care and protection, and this point of view governed the situation for two centuries. Tobacco, that "scurvy weed" as the old Providence Company called it, was the staple product, but sugar, ginger, rice, and indigo played a part in trade transactions; British policy, moreover, was not altogether sordid, as in the desire to give plantation tobacco an unfettered sale the cultivation of the plant in England was rigorously suppressed, no less than eighteen counties in England and Wales, where its growth had been undertaken with satisfactory results, being placed under a prohibitory ban. In the teeth, however, of this restraint it is found that the Council looked with little favour on the excessive production of tobacco in the Plantations and, in spite of its profitable nature, attempts were made to divert cultivation into other channels,

as the people of Virginia were urged by the Council to "use their best endeavours to bring all other commodities of that country to perfection," but for all their exhortations the "scurvy weed" maintained its prominence.

One interesting letter to the Governor of Jamaica, under date October 1668, commending to his care "the Cherishing and Preserving the Plants and Trees" producing "Pepper, Cloves, and other Spices" and directing that—

"as any New Plants of that nature come to be discovered, you from time to time send some of the severall Species, to the Clerk of the Council attending, to be by him presented to the Board, and that you make trialls and take the best care you can by Cultivating and Transplanting to Improve them to Publique Benefitt,"

indicates the most strenuous desire to break down the monopoly of the Dutch Spice Islands, to which end the Board were willing to assume functions outside any special qualifications.

A much earlier Order of still more curious significance announces that "to the end that some of the wood landes might with less charge be converted into pasture and arable, as also the Colony might be sett on worke the whole yeare," the Company of the Newfoundland Plantation were permitted—

"to transport thither the materials to make barre yron, as yron oare stone and cinders, as also the instruments of that worke, that thereby they might be encouraged to go on in their purpose of creating yron workes in that plantation."



A remarkable proof of the wide range covered by the Council's purview and the notable intelligence by which it was often guided.

In the seventh and eighth decades of the seventeenth century the Caribbean Sea was the theatre of fierce wrangling between England, France, and Spain, where the latter Power, jealous of its past pre-eminence in those waters, still claimed special privileges in Yucatan and elsewhere, and in maintaining these against the smuggling of British merchants, Spanish seamen were provoked to the most lawless cruelties and letters of reprisal were in constant demand. Though such letters did not in the estimation of those days amount to an open declaration of war, they tended to lead to one. In commenting on the reluctance of Charles II to issue them, Mr. Grant remarks that if partly due to laziness, it "was not without a touch of the enlightenment and even heroism which made him in a sense the forerunner of Walpole"; and he might have added, a conspicuous proof of that monarch's disposition to be in many directions in advance of his times.

The case of the *Virgin*, seized off Havana by a Spanish ship under the command of an English renegade, Philip Fitzgerald, occupied the British Foreign Office from October 1673 to 1680. No redress being obtainable at Havana, where the ship was condemned and sold as a prize, the Council instructed Lord Arlington—

"to write to His Majesty's Ambassador at Spain to demand reparation for the ships *Humility* and *Virgin* taken in the West Indies by Don Philip Hellan (alias Fitzgerald) Captain of a Spanish Man of War and for the cruelties and murders committed on

Mr. Timothy Stamp merchant sailing on the *Humility* and the mariners of the said ships."

Three months later the case was referred to the Committee of Trade and Plantations, whose report, read on March 11th, 1674, suggested that if redress "be denied or delayed unreasonably . . . His Majesty cannot in honour or Justice deny his Subjects the Liberty of taking such course for their reparation as is agreeable to the Law of nations by way of Reprizall," and was ordered to be given to Lord Arlington for use in obtaining satisfaction, the report concluding with the reflection that as two of His Majesty's subjects revolted to the Spaniards are the chief instruments of the aforesaid injuries and depredations, their Lordships are of opinion—

"that a Proclamation be issued for recalling of his Majesty's subjects from the service of any forrain Princes between the two tropicks in America with a Promise of Pardon if they surrender themselves within a convenient time, And that the Governor of Jamaica receive speedy Order for securing the said Persons if they shall be found so offending after the time limited within his Government or elsewhere and to cause them to be sent Prisoners into England by the first Passage."

His Majesty, approving of the said Report, ordered it to be given to Lord Arlington for use in obtaining redress and the continuance of the trade in logwood.

The case continued to drag on with the postponement of any Order for reprisals from year to year, until in 1680 a further petition of the owners for the payment of damages, with the addition of £2,000 for the prosecution of their claim up to date, was

referred to the Committee ; and on their report, August 11th, 1680, Sir Leoline Jenkins is directed to press the Spanish Ambassador for satisfaction and to send a statement of the case to the English Ambassador at the Court of Spain. Sir Leoline appears to have acted upon his instructions, but thereafter nothing more is on record in connexion with the matter.

To go back a little, some light is thrown upon the first conquest of Canada in 1629-32. David Kirke having in 1628 attacked and destroyed the French provision fleet off Gaspé, Quebec surrendered in the following year to his brother Lewis Kirke. The French Ambassador petitioned the Council on behalf of a Frenchman, who had already begun suit action against Kirke and his fellow-adventurers in the Admiralty Court, claiming that some of the goods brought home by Kirke were his private property. "The English claim them by way of Trade and bargaining, And the French affirming that they took them away by force." The goods were accordingly sequestrated and an official lock placed on the warehouse where they were lodged. Whereupon the lock was wrenched off and the goods retaken by the Adventurers. At this, prompt submission and retribution was ordered by the Council.

"And because the Boarde did think fitt and resolve that an Insolencie of soe high a nature and in Contempt of all authoritie and Government was not to be past over without some exemplarie punishment, It is ordered that the Judge of the Admiraltie should by examination on oath or otherwise enquire and find out who were the principall Actors in the breaking open of the said Warehouse and carrying

away the said goods, and thereupon make Certificate to the Board, to the end such further course might be taken for the punishment of them as their Lordships shall find cause."

The matter was not adjusted until in April 1632 the Treaty of Peace was signed at St. Germain-en-Laye, by which Canada was restored to France on payment of the dowry of Queen Henrietta Maria.

For the moment the Revolution of 1688 worked no change in the relations of the State to colonial administration: the appointment of the whole Council as a Standing Committee of Trade and Plantations was renewed in February 1689 and maintained for more than seven years, so that, as Professor Andrews puts it—

"Nearly to the end of the seventeenth century the King and the Council with their advisory boards and committees were in absolute control of all colonial business and shaped an administrative policy that was to last but little changed for another century."

Nor while embracing these interests from a commercial point of view did they fail to cover the whole field of obligation with an ampler glance, as is shown in the appeal often made to their hearts and consciences. They brought to light all that was available within the range of civil and judicial organization together with military equipment, while they maintained a statistical department, which furnished all the information immediately needed.

With the dissolution of the Committee of 1689 in May 1696 its powers were transferred to a body of commissioners, later to become the Board of Trade,



but for the present known as the "Council of Trade," or more fully the "Lords Commissioners of Trade and Plantations," a body which under whatever name retained its prestige and authority as a Committee of Council, a status which is still embalmed in the traditions of our Board of Trade.

All Plantation business, however, was not absorbed by this Board. With the growth of the Plantations in area and population, the appellate jurisdiction of the Council became more and more extensive, as it penetrated every branch and touched every intimacy of colonial life.

By way of marking the change from era to era with the coming of the eighteenth century, Professor Andrews observes that the Privy Council, though retaining its dignified position as one of the oldest and most commanding of all the organs of government and still influential as the ultimate authority in colonial affairs, was fast losing its place as a deliberative and originating body. He writes that two Committees stand out with special prominence during this epoch, the Committee for hearing Appeals, Complaints, etc., from the Plantations, and the Committee for the Affairs of the Plantations, though at the same time admitting that other Committees were appointed *ad hoc* as occasion arose. On the whole, however, as it has been pointed out elsewhere, it is more probable that there was really only one Standing Committee, known as "The Lords of the Committee for hearing Appeals from the Plantations," and that what appear to be special Committees are really *the* Committee sitting to consider a special case, as in many instances a Committee concerned with a particular case is

described under different names. It is a standing difficulty in interpreting documents no older than these that the student is brought up against so much "terminological inexactitude."

Thus a close scrutiny of the records produces cases where the title of the Committee suggests its having been called for one purpose, while an examination of the business transacted proves that it was mainly concerned with another. Still, as Professor Andrews seeks to emphasize, the Board established in 1696 was the direct successor of the Councils and Committees of the seventeenth century and the faithful guardian of their policy. Though the field of its activities was more limited, yet within their narrower range more was found to do, owing to the great expansion of trade that ensued, particularly during the peaceful administration of Fleury and Walpole. In one sense, however, it was not so powerful as the older bodies, because, though limited like them by no power to carry out a policy, their carefully formulated plans might be frustrated at any time by a hostile vote in Parliament or by an overriding decision of the Privy Council.

The judicial appeals recorded are mostly from the decision of a colonial Governor and Council sitting as a Court of Appeal or Chancery, and these were often successful, though proper care seems always to have been taken to treat the decisions superseded with becoming respect. These appeals were popular with litigants, but the jurisdiction of the Council was offered an obstinate opposition by the corporate (or incorporated) Colonies; as when the Government of Rhode Island incurred the rebuke "that it is the inherent right of His Majesty to receive and

determine Appeals from all His Majesty's colonies in America," and very early in the relations between the two, Massachusetts had deemed allegiance to the Colony of greater moment than allegiance to the Crown. In spite of all obstacles and omissions, the range of material dealt with by the Council is alleged to have been so great "that we can trace, if only in outline, the history of nearly every colonial problem of the time."

One of the standing abuses of the system was the corruption of Governors, which grew to a great height in the corporate Colonies. There is no question that during the first half of the eighteenth century the character of colonial Governors sadly deteriorated and that very little sense of responsibility, such as was very marked with the later Sovereigns of the Stuart dynasty, appears in the appointees of this epoch. A whole catalogue of crime and corruption comes to light in the investigation of the charges against Governor Bennett in the Bermudas during the early part of this period. Between sixty and seventy of these were established, including the issue of commissions in his own name which were unrecorded in the Secretary's office, misapplication of money raised by the Assembly, putting the public seal to the charter of privateers, the embezzlement of stores and ammunition, the exchange of French prisoners at Martinique for brandy and wine, when on the return of the ship the Governor—

"met with several of the Council on one of the small islands and drank of the said wines and spirits to such a pitch that they stripped themselves and danced naked before the minister, Mr. Holland, and

would have burned their clothes and fired their guns (which must have alarmed the country) in the middle of the night had they had fire with them."

Illicit trade was encouraged on making a present to the Governor, by the examination of letters and the retention of such as he pleased to the prejudice of trade. Permission was given to soldiers to keep public-houses and absent themselves from muster. Unlawful imprisonment was rife, to which end he suspended Jones, the Secretary and Provost-Marshall, and made Colonel Anthony White Chief Justice, who had formerly been arrested by Jones as an accomplice of pirates; he was also believed to have married his mistress to his own son, and, when the latter resented it, had him sent to England and kept in Bedlam as a lunatic till he died. Indeed, this Governor seems to have swept the whole gamut of crime without interference, and when the question of his removal was raised, got a petition signed for his continuance in office by calling out the militia and bringing each man to the drumhead to sign in his presence. The later history of Bennett is instructive. Turned out by the Tories in 1713, not for misbehaviour but on the ground that there must be a change, his successor put him in gaol, but on the death of Queen Anne he was brought back by the Whigs to rule the islands for another six years. Edward Jones, the Secretary, who collected the eighty-seven articles against him in 1708, obtained as late as 1726 the reversal by the Privy Council of a judgment given against him in Bermuda in 1714 on Bennett's action for slander.

The things for the production of which the



British Government mainly looked to the Plantations were minerals and navy stores, and in this connexion they were constant in their pressure upon the different States ; ready approval being given to a charter incorporating a company to trade with Pennsylvania in " stores for the use of Her Majesty's navy here in England."

Their view of trade with the Plantations, when the British Government rejected an Act of Virginia " for the Advancement of manufacturers for the Growth of the Country," is well illustrated by the excuse given that the Act is particularly unreasonable in compelling the merchants trading from England to receive their debts in commodities. A similar exhibition of narrow aims is found in the warning addressed to Massachusetts Bay not to endanger its charter by persisting in passing an annual Act " of a very extraordinary nature, laying discouragement on the shipping and manufactures of the home country," which—

" not only allows the importation of all sorts of wines and commodities directly from the place of their growth, but charges the same commodities with a double duty if imported from this Kingdom, from which only can they be legally imported."

The supply of seamen for the Royal Navy in times of war led to numerous Orders whereby the Council sought to limit those available for merchant shipping, traders being compelled to fill up their complement with landsmen, the procedure for an equitable distribution being dictated to the merchants, who had no choice but to accept it. The Council took pains to cultivate the fidelity of the Indian tribes

along the Canadian frontier, "least the Intreagues of the French and the influence of their priests who frequently converse and sometimes inhabit with those Indians should debauch them from Her Majesty's allegiance." In furtherance of the same object it was ordered that two Protestant ministers should be appointed to live amongst them mainly for political ends. To those familiar with the magnificent work of the Jesuit missions among the tribes, the concern of the Queen's Government will cause no surprise.

The problem of Imperial defence was another source of embarrassment, particularly on the financial side, the needs of New York being especially prominent, as appears in a report ordered by the Council "to be laid before Her Majesty by the Earl of Nottingham at a fitting opportunity," which dealt with the most pressing methods of making the necessary charges. The object sought was to induce the neighbouring States to co-operate for mutual defence, to which Massachusetts and New Hampshire were not warmly responsive. However, Colonel Dudley, the Governor, so exerted his influence "that upon Intimation of an invasion intended by the French and Indians by land, he had prevailed with the Assembly to agree to an Act for listing every fourth man in the Province, to be ready Armed and Cloathed fit for a March in Twenty-four hours." Boston at least gave evidence of some zeal in self-defence, for the colonial Government was able to report that it had completed the building of a fort on Castle Island and claimed fulfilment of a promise from the Imperial Treasury to furnish the stores requisite.

Hints of the coming struggle for the control of the Mississippi Valley were early apparent, as is seen by the settlement in 1709 of a large body of emigrants from the Palatinate and Switzerland upon the western frontier of Virginia and North Carolina, which was promoted by the Board of Trade in—

“ That the settlement of such a Colony in the place desired will be a publique benefitte and Advantage, By strengthening the Frontier of Virginia against the French of Canada and Mississippi and by the increased Trade and Navigation.”

Territorial expansion had already been secured under the Treaty of Ryswick by the absorption of the vast territories controlled by the Hudson Bay Company, and the Treaty of Utrecht won a further acquisition in the shape of Nova Scotia.

A valuable and exhaustive report was approved by the Council in 1709 and ordered to be communicated to the States concerned, reviewing the salaries of Governors payable in the West Indies, particular mention being made of Barbados, Jamaica, the Bermudas, and the “ Governor in Chief ” of all the Leeward Islands. Augmentations on an even more generous scale were approved for some of the American States, New York being dealt with liberally, and Massachusetts rebuked for its habitual contumacy. In New Hampshire, “ where no certain Provision has yet been made,” the Assembly is charged to make a “ fitting salary.” The arrangements in Virginia and Maryland are approved, but—

“ as to the Proprietary and Chartered Colonies, viz. Rhode Island, Connecticut, Pennsylvania, Carolina, and the Bahama Islands, we cannot propose anything

on this occasion, the Governors of those colonies not being appointed by Your Majesty and depending either upon the Proprietors or the people from whom they have very meane and uncertaine salarys ; which encourages them to connive at unlawful trade and other Irregularitys inconsistent with the Interest of this Kingdome, which great mischief can only be remedied as we humbly conceive by reducing these Colonys to an immediate dependence on the Crowne."

In all cases where an increase of salary was authorized, a special injunction against receiving presents is attached.

Religious persecution in France and other parts of Europe led to continual incursions into the New World which were favourably looked upon by the Council, their military and economic value being fully recognized by those concerned, " 3,000 palatines " alone being employed in the State of New York in the production of naval stores. It may be doubted, however, whether these immigrants in the long run contributed to the strength of English feeling : they had no sentiment of the kind rooted in the traditions of the past, and, having brought from the place of their birth and bringing-up a prejudice against government as an institution, they were probably ready on the first provocation to ally themselves with the recalcitrant section of the community.

The space of time covered by Walpole's administration was in the main one of peaceful relations both at home and abroad. This atmosphere was reflected in colonial progress, where the claims to greater freedom were not actively resisted or granted



in practice with some reserves of principle. The proportion of colonial business occupying the Council steadily increased, and the mere fact tended to keep administration up to the mark. Indeed it has been said that the work of the Privy Council through its Committees, and the very real share it took in the task before it, is perhaps the most direct addition we have to our knowledge of the period. It displayed, moreover, great care in the exercise of its powers. Thus in dealing with a representation of the Board of Trade for the confirmation of an Antigua Act constituting a Court to hold pleas of foreign attachments, the Committee for Plantation Affairs, to which it was referred, proceeded to take the opinion of the Law Officers, upon whose report the Committee recommended disallowance on the ground of the inconvenience it might cause British merchants, to the discouragement of their giving credit to persons resident in Antigua. After careful investigation it sought to modify the instructions to the Governors of Newfoundland and of New England, and on the complaint of the inhabitants of Bermuda that certain instructions were irksome and impracticable, relief was granted without undue delay. It deserves credit, moreover, for the attempt to check the greed of patent officers by the outspoken declaration that vested rights must give way to "the great and general good of the community."

One bond at least tended to hold the Plantations and the Home Country together, viz. the interest of mutual defence, and although colonial opinion in many cases may have tended to make more of rights than duties, there were moments when, like the American Admiral in China seventy years ago,

they felt the plea that "blood is thicker than water." As it has been well put by Mr. Munro :

"If Massachusetts haggled for nearly forty years before she paid for her supplies of powder, yet her sons died of fever before Carthagena in a quarrel which was none of hers and under a New England Colonel took Louisbourg on lines which in the second siege Amherst and Wolfe were fain to follow."

The correspondence with Jamaica relative to the taking over of Belize, the island of Rattan, and the Mosquito coasts shows no disposition on the part of the island to shirk Imperial responsibilities, which is endorsed by the decision of the Council "that the island of Rattan should be dependent upon the Government of Jamaica, whence it may best be supported." This decision may indeed be said to foreshadow the far-seeing policy of decentralization which was later to direct Imperial activity, and in the words of Sir Charles Lucas shows that Jamaica was regarded—

"not merely as a single settlement, however strong or populous, but as a centre of British influence in these seas, a colony with outlying dependencies, the point from which Great Britain made her power felt and extended her commerce along the coasts of Spanish America."

The conflict of interests was often more than the Council could control. Without attempting to ascribe undue malignity to either, it would be easy to show that the aims of colonial politicians were as selfish as, and less far-seeing than, those which inspired the Board of Trade. The Whig nobles were well-meaning and often intelligent

rulers, and if corruption can be alleged against some of their deputies and underlings, at least as much can be said of the colonial traders who sought persistently to cheat their British creditors. The British authorities, as the proceedings of the Council invariably show, were always ready to suppress abuses if brought to their knowledge ; but as time went on, the American States with the instinct of emancipation from pupillage preferred to take the remedy into their own hands, with the result of constant friction and no small threat of violence.

In New York, "where," says Professor Andrews, "the victory was first won, the overthrow of the royal prerogative was so complete" that in 1754 the Privy Council could say :

"The assembly have taken to themselves not only the management and disposal of the public money, but have also wrested from your Majesty's Governor the nomination of all officers of Government, the custody and direction of all military stores, the mustering and regulating of troops raised for Your Majesty's service, and in short almost every other executive part of government."

In spite of this demonstration of independence, the Board of Trade was still asserting that there was "nothing so necessary to the preservation of His Majesty's Government in the Colonies as the careful and strict maintenance of the just prerogative," and a little later the Privy Council could deny with great emphasis the heretical claim of the Jamaica Assembly, that its privileges did not flow from the grace of the King but were rights inherent in themselves. It went further in stigmatizing the action of the Assembly in St. Kitts as

seeming "to have corrupted its own constitution by affecting a power which they have not, analogous and co-equal to that of the House of Commons of Great Britain."

The piteous failure of the countrymen of Locke to apply to themselves the doctrinal significance of their revolution illustrates most pathetically the blindness of all Governments in their turn in adhering to comfortable sophistries and timeworn fictions. The dominant passion in the Colonies was the temptation, natural in a new and undeveloped country, to make the most of opportunities for trade, which were given them in great abundance throughout the Seven Years War.

"From 1756 to 1761," says Professor Andrews, "when Great Britain was fighting in India and America and on the Continent, was subsidizing Frederick the Great and was paying out large sums to recompense the American Colonies for their share in the attacks on Canada, the colonial merchants, shipowners, and captains were engaged in commerce with the French to England's injury and their own profit. Among the French West Indies, on the Gulf of Mexico, and along the northern Canadian frontier, colonial provisions were carried to the enemy by means of every channel that the war provided. Colonial merchant ships went to the French West Indies under flags of truce for the exchange of prisoners, but instead they carried contraband of war . . . and brought back coin and sugar. The Dutch and Spanish harbours in the West Indies became veritable clearing-houses of traffic with French merchantmen and ships-of-war. All the northern Colonies engaged in this business without compunction, Rhode Island and Pennsylvania being the greatest offenders, though



even Virginia and South Carolina could not keep clear of this alluring chance of making profit at the expense of their allegiance to the British Crown.”<sup>1</sup>

With this accumulation of causes for mutual antipathy, it is not surprising that stored-up resentments burst into flame on the first years of peace, and it may well be that George Grenville, sensible of what had happened in the war, was determined to get something back by means of the Stamp Act, the Council having proved powerless to interfere with the traffic while hostilities lasted.

Generous dispositions were, however, prolific at the same time, for in August 1762, in response to Petitions of two learned doctors in the respective faculties of Divinity and Physics, the Privy Council were moved to issue letters patent, from which the following extract exhibits an edifying outline of imperial education suitable for colonists, as apprehended by instructors at this date.

“ Not so much to aim at any High Improvements of knowledge, as to guard against total Ignorance ; to instill into the minds of Youth just Principles of Religion, Loyalty, and a Love of our excellent Constitution, to instruct them in such Branches of Knowledge and useful Arts as are necessary to Trade, Agriculture, and a due Improvement of His Majesty’s valuable Colonies, and to assist in raising up a Succession of faithful Instructors to be sent forth not only among His Majesty’s subjects there, but also among the Indians in alliance to His Majesty to teach both in the way of truth, to save them from the corruption of the

<sup>1</sup> Andrews, *Colonial Period*, pp. 198, 199.

Enemy and help to remove the reproach of suffering the Emissaries of a false Religion to be more zealous in propagating their Slavish and destructive tenets in that part of the World, than Britons and Protestants are in promoting the pure form of Godliness and the glorious plan of Publick Liberty and Happiness committed to them."

The length of the homily here given is not one-fourth of the text included in the Acts, which makes it the more interesting to reflect that a great body like the Privy Council, steeped in mundane pre-occupations, should yet find time to devote itself to the moral uses of government and pursue for several pages a line of thought at once so earnest and so exacting. The design of reproducing under the alien conditions of a new and undeveloped society the cultural types of the old world was doomed to fail, though the occasion arose from a motion on behalf of two learned faculties; but surprise is excited that it should have led to such a painstaking and exhaustive review of the circumstances that at this juncture were deemed to render American soil a favourable seat for the reception of ideas that had been the slow growth of a secular civilization. The leaders of thought in the States about to be "United" had their own ideas of the plan upon which they were to proceed in bringing a new order to the birth, and in this instance with all its goodness of intention the Home Government was not far from becoming the dupe of its own credulous simplicity. The Council were at constant loggerheads with colonial Assemblies on the subject of their legislation, which with more and more frequency took the form that was held to be an

encroachment upon the sovereign authority. In many States it became the practice to exclude Crown officials from Council and Assembly and to enforce the popular character of their pretensions by frequent elections. South Carolina and Jamaica were conspicuous in enterprises of this nature, upon which in regard to the last named the Privy Council expressed themselves with unusual vigour :

“ The Limiting the Duration of the Assemblies to short periods and fixing their Determination by Law, Manifestly tends to the Discouragement of Industry and the Prejudice of Trade, Destroys good Neighbourhood, keeps up ill Blood, nourishes a Spirit of Party Divisions and gives Faction an Opportunity to Act with better Concert and to greater Effect.”

A lavish use of capitals is the surest index of the Council's feelings. Another source of mortification, which they had to put up with, lay in the habit of colonial legislatures of reinforcing their own claims to independence and striking at the overruling authority by withholding the salaries of Governors and Judges, with a view, as the Council said, to “ awing and deterring them from the due and faithful execution of their duty and the proper exertions of those legal Rights and Privileges which they are . . . commissioned to support.” In one State fees were reduced to such a pitch for the officers of the Courts of Justice “ that no persons of Character or Reputation will care to accept of employments therein.” In South Carolina and Georgia the removal of actions from the ordinary Courts to the purview of local justices of the peace was another

method of giving trouble, which drew from the Council the opinion :

“ It is difficult to conceive a State of Government more dangerous to the Rights and Liberties of the Subject . . . aggravated as the Evil would be by making the Judges answerable for good behaviour without rendering them at the same time Independent of the Factious Will and Caprice of an Assembly.”

Jealousy of the Assembly is a constant factor in the outlook of the Home Government. Thus in commenting upon the situation in New York a Committee Order of August 6th, 1743, unburdens itself in these piteous terms :

“ There is nothing so essentially necessary to the preservation of His Majesty’s Government in the American provinces as the careful and strict maintenance of the just prerogative, which is the only means by which those colonies can be kept dependent on the Mother Country, or the Governors themselves representing the Crown maintain any power over their Assemblies or any agreement with them. No Governor ever departed from the prerogative in one instance, but he raised in the Assembly a confidence to attack it in another ; which as constantly brings on contests which again create animosities, which in the end obstruct all parts of government.”

Hard words break no bones, and so things drifted on to the inevitable conclusion, leaving a trail of truculent contumacy on the one side and impotent wrath on the other. The wider outlook in many respects belonged to the Council, but in others colonial legislation was in advance of the times, as



is shown so early as 1742 in an Act permitting a married woman to part with her property in the lifetime of her husband, which after reference to the Law Officers is disallowed by the Council on the Committee's report as "the first instance wherein the Legislature in any of the Colonys abroad have taken upon them to alter the Law in so settled and known a point." Relaxations of the same type were disallowed in other States, and in Nova Scotia a clause allowing divorce after three years' desertion had to be omitted.

An acute difference of opinion arose with some States on their efforts to relieve the financial strain of war by the establishment of a paper currency, a step which in the case of Virginia had the support of the Governor Dinwiddie, who in forwarding the Act to the Council urged that the issue "was become a matter of absolute necessity, the silver and gold that should have been current there having been chiefly collected by the Agent of the public and by him transmitted to the Northward for the payment of Your Majesty's Forces." But the Council was obdurate. "No one," the Board of Trade declared, "can trust any property in a country where such Laws are subsisting." Stress of circumstances was, however, in the long run too strong for the financial purists, as in 1764 an appeal to the Sovereign legislature elicited an elaborate report from the Board of Trade reviewing the whole history of the controversy and reaching a conclusion which, while not insisting upon the proscription of paper money, urged the imposition of proper safeguards.

War was in some respects the acid test of colonial

loyalty, and it is curious to note that fractious as it was in civil affairs, the State of Massachusetts came well out of the ordeal of hostilities, for there is on record the submission to His Majesty in Council of a humble Address from the Legislature of that State, returning their humble thanks to His Majesty for his Paternal Goodness to his Subjects in that Province, and among other instances thereof, for His late Royal Bounty in Causing a supply of Ordnance and Ordnance Stores to be sent thither—"which the King was pleased to receive very graciously and it was accordingly ordered to signify the same to the Governor of the State."

The spread of British settlement after the Seven Years War was bound to add to the acuteness of the Indian problem, and the Home Government were profoundly impressed with the prudence of making amicable arrangements with the native tribes. The demand of the Ohio Company for large tracts west of the Alleghanies was met by instructions to the Governors of the border States that no such grants were to be made, "as settlements on Indian hunting ground had been the principal cause of the merciless devastations of the Western frontier." The prohibition of western migration could not of course be enforced, though the attempt was made by instructions to the Governors of Virginia and Pennsylvania to order the evacuation of settlements on the Ohio, and to Amherst to break any colonies at Niagara and Wyoming. Some success attended the Council's efforts to secure the future of their allies, the Iroquois, and much was done to meet the complaints of other tribes; but there was no real check to be put upon an irre-

sistible tide. The strongest expression of the Council's opinion in this matter is contained in an Order of November 23rd, 1761, for the preparation of instructions to the local authorities on the subject, which proceeds as follows :

“ The granting Lands hitherto unsettled and establishing Colonies upon the Frontiers before the Claims of the Indians are ascertained appears to be a measure of the most dangerous tendency and is more particularly so in the present case, as these settlements now proposed to be made especially those upon the Mohawk River are in that part of the Country of the Possession of which the Indians are the most jealous, having at different times expressed in the strongest terms their Resolution to oppose all Settlements thereon as a manifest Violation of their Rights.”

A petitioner with the name of “ Caiesaponakeeca,” a self-styled princess of the Creek nations but described by the Council as Mary Bosomworth, the half-caste wife of a runaway missionary, caused some trouble ; but though her demands were suggestive of blackmail, it was deemed expedient to buy off threatened hostility at a cheap rate. Great nobles such as the Dukes of Richmond and Montagu and the Earls of Eglinton, Stirling and Egmont, took advantage of the Proclamation of October 1763 to acquire large territories.

“ No capitalists,” says Professor Andrews, “ of modern times ever sank greater fortunes in more profitless expeditions than did the merchants and noblemen of England, to whose efforts this great republic in large part owes its origin.”<sup>1</sup>

<sup>1</sup> Andrews, *Colonial Period*, p. 19.

## CHAPTER XI

### COLONIAL PERIOD (2)

THE regulation of the new Canadian Government presented a very difficult problem, but after eleven years of chaos tempered by sympathetic administration was eventually met by the Quebec Act, which was pushed through Parliament in spite of Opposition criticism by men who had thoroughly mastered the situation. The Council saw the importance of a settlement, which they emphasized by pressing letters to the Lord Chancellor, Lord Mansfield, Lord Camden, and the Master of the Rolls (a formidable body of legal eminence), asking them to give their assistance and advice at the next meeting of the Council, when the draft of an additional instruction relative to the establishment of Civil Courts of Judicature in Quebec was considered and finally returned to the Board of Trade as amended by the suggestions of the Law Officers.

The Council was by no means insensible to the advantage gained from the conquest of Canada, as we find it in one place described as an "invaluable acquisition," and in another we are told that the "Whale Fishery, which was entirely neglected by the French, has been prosecuted with great Spirit and Vigour since Canada has been in His Majesty's Possession."

A pleasing instance of signal service adequately rewarded comes to light in the Council's treatment



of an Admiralty memorial on behalf of Denys de Vitré, a native of Canada who was taken prisoner in the year 1757, when master of a merchant ship bound from Bordeaux to Quebec. The document proceeds that in the year 1759 he was prevailed upon to act as pilot on board the British Fleet, employed in the expedition against Quebec, and was very serviceable in piloting the ships-of-war and transports up and down the St. Lawrence; and in the following year on board the squadron under Commodore Swanston which relieved Quebec, when besieged by the French forces. His services on these occasions being too notorious to permit of his return to France—

“he hopes that a comfortable subsistence for him and his family may be assigned him here and Sir Charles Saunders [First Lord of the Admiralty] having informed us that while he commanded the Fleet on the expedition to Quebec, the said Pilot exerted a most uncommon Zeal and Assiduity in the services in which he was employed, many of which were of great Importance and Utility to the success of the Expedition, and that he often assured the said Pilot (as he was authorized to do) that, if he behaved well, the Government would provide handsomely for him the rest of his life, . . . We do therefore humbly propose to Your Majesty that he may be allowed a Pension of two hundred pounds a year, and that the same be placed upon the Ordinary estimate of the Navy.”

The display of turbulence and self-assertion of which the last chapters are full, bears witness to the impending struggle which tore in two the Continent of North America and smote the British Empire

with a shock that reverberated in another hemisphere. It was not wanton discontent on the one part, or deliberate blindness on the other, but the permanent forces of legitimate growth pitted against the timid adherence to time-worn restraints.

Signs for long had not been wanting to those heedful of the logic of history that the channels of public expression had become too narrow for the demands of a people increasing daily in coherent purpose and self-conscious life. It was not only that their needs were fuller, but they were more exacting as to the means of satisfying them. Restrictions which in the days of tutelage corresponded to the scruples of an inchoate society were now vehicles of an interference which was known to be vexatious and suspected of being futile. Even in their disputes with one another the several Colonies were feeling towards some principle of arbitration in the general sense of the community rather than in the invocation of external authority, which they were contented, it is true, to use, but with an almost otiose disdain. There is, as a rule, little to be said for the earlier occasions of their violence ; its object appears, as often as not, merely to *embêter* the British Government or make an unpopular Governor feel his impotence. The break with precedent is always on the side of the Colonies, and theirs too the arrogance of innovation. It is almost pathetic to read the language of indignant protest in which the action of an Assembly is described as an encroachment on His Majesty's prerogative "by wresting from the Governor several of the executive parts of Government," or of another as "tending to lessen that just dependence which the Colonies ought to

have upon the Government of the Mother Country ” ; excellent doctrine for a century past, but at the moment a dangerous challenge, for through it all is heard the ground-swell of a definite departure, sometimes perhaps unconscious of its working, but always sure of its aims, for it represented the birth-throes of a great nation and the movement of a free people towards no uncertain end.

The literature of the time is full of the premonitions of independence and a conviction of the power to win it, if need be, at the point of the sword. It is natural that the first expression of these tendencies turned upon a question of taxation. The formal renewal at the beginning of the reign of what were known as “ writs of assistance,” giving a general right of search for dutiable articles to the agents of the Customs, exposed the inconvenience of the power claimed by the Mother Country ; while the Stamp Act and the advertisement given to it by Grenville’s ill-judged tactics raised the theory of right in its most abstract form. From that moment, though responsible men in the Colonies were more inclined to lay stress on the impolicy of the measure, the extreme Whig doctrine of self-taxation found many adherents. Patrick Henry, on the platform and in the Virginian Assembly, Samuel Adams, the organizer of disaffection in Boston, James Otis, thinker and pamphleteer, Alexander Hamilton, statesman and publicist, and others of less note swelled the chorus of indignant remonstrance, and in the struggle between Bernard and the Assembly of Massachusetts men went so far as to affirm that the Parliament of Great Britain had no right to legislate for the Colonies. So blind, however, was

the temper of British politicians that within eighteen months of the Declaration of Independence Sandwich described the people of America as "incapable of discipline, whose numbers would only add to their defeat." Nor was the condition of home politics unfavourable to the reception of such opinions. The Whig party had fallen upon evil days. The isolated ambitions of Chatham had shaken its self-confidence and threatened to dissolve its connexions, while, except in the conduct of a great war, he had introduced no new principle of cohesion. George III, under this aspect no inapt pupil of the Great Commoner, used his influence to widen the rift; the obstinate dogmatism of Grenville, the libertine wit of Townshend, and the pliant humour of North were successively at the King's service.

At the moment reached the "transient and embarrassed" Cabinet of Rockingham had come to an end. The effect of the repeal of the Stamp Act, its one title to honour, was marred by a statutory declaration of the right to tax the Colonies. The fall of Rockingham had been hastened by the resignation of Grafton, and it was to him that Chatham turned as his principal lieutenant in the formation of a new Cabinet. Of considerable abilities and with powers of speech that attracted the attention of his contemporaries and have been emphatically praised by Lecky, the historian of the eighteenth century, the Duke of Grafton had at this date little political experience and was liable to have his judgment clouded by irresolution at critical moments. It was therefore no small tribute to the estimation in which he was held that Chatham should have



selected him as his lieutenant, and the probity of his views on the principal issue at stake justified the selection. Writing long afterwards of his responsibility at the moment when Chatham's illness threatened to become chronic, he ventured to hazard the belief that if his disposition for moderate counsels had been pursued by his successors, "the country would have readily settled its disputes with our Colonies and at the same time relieved America from the fetters of the old charters." How these hopes failed needs no explanation here. The eclipse of Chatham, the escapades of Townshend, and the subservience of North to the King's prejudices brought disaster nearer till the fatal moment when, in the absence of Hawke, who would have voted with the minority, Grafton was defeated by one vote in the effort to have tea included with the other duties to be repealed, and Hillsborough betrayed his chief by the omission from the minute communicating the decision to the Governors of the Colonies of the conciliatory expressions which the defeated section of the Cabinet obtained their colleagues' consent to introduce.

The sequel is well known, but it is fair to Grafton to add that, once free from the trammels of supreme office, he exerted himself manfully to retrieve the errors of the Administration of which he had been the head and to restrain his successor from aggravating them. He was one of the first to see that "to lose America entirely would be a lesser evil than to hold her by a military force as a conquered country," and on repeated occasions testified to the pride he took in being a warm friend of the colonists. His last effort towards conciliation was memorable

for the assertion that they were united to this country "by every tie of fraternal affection, every motive of material interest, and every principle of common defence, protection, and support."

It is one of the commonplaces of historians who have studied the period that, faulty as may have been the disposition of statesmen at home, the character of their agents in the Colonies left still more to be desired. Previous parts of this work have brought to light that the personal government of Charles II and his brother contrasts favourably in this respect with the Parliamentary régime which followed. Discussing the reputation of these persons, Sir George Trevelyan describes many of them as "needy politicians and broken stock-jobbers who in better days had done a good turn to a minister and for whom a post had to be found at times when the English public departments were too full or England too hot to hold them," and of another class who were "narrow and plodding," of whom Franklin is quoted as saying: "Their office makes them insolent, their insolence makes them odious, and being conscious that they are hated they become malicious." Of this type Sir George Trevelyan selects Bernard, Governor of Massachusetts during the early troubles (1760-70), whose letters, he says, "contained the germ of all the culpable and foolish proceedings which at the long last alienated America"; and again "Throughout the agitation against the Stamp Duty he studiously exaggerated the turbulence of the popular party and underrated their courage and sincerity."

Upon "a representation of the House of Representatives containing divers charges against "

Bernard, a Committee of the Council met on February 28th, 1770, to hear the Agent for the complainants and the Governor, whereupon the Agent declined to proceed "without having further time allowed him to procure the necessary proofs from his constituents." This the Committee, after a close examination of the plaintiff upon the communications that had passed between him and the Speaker of the Assembly, declined to allow, and at once dismissed the petition "as groundless, vexatious, and scandalous," though these epithets were obviously more a matter of assumption than argument. Moreover, Bernard had already a baronetcy for his firmness, according to the *Complete Baronetage*, in carrying out the views of the Home Government. The members of the Committee of Council were the Archbishop of Canterbury, the Lord President, Duke of Queensberry, Earl of Shaftesbury, Earl of Kinnoul, Earl of Marchmont, Earl of Hillsborough, Viscount Barrington, Lord le Despencer, Lord Sandys, Welbore Ellis, Hans Stanley, Richard Rigby, Master of the Rolls, and Chief Justice Wilmot—a somewhat undistinguished company.

One of the first collisions of the Council with the Assembly of Massachusetts turned upon the disallowance of the Act "for granting compensation to the sufferers, and of free or general pardon to the offenders in the late times," as the Committee found unwarrantable the incorporation of an Act of Pardon, "without having obtained Your Majesty's previous consent"—an instance of the narrow points taken for the frustration of colonial wishes. It was upon an address of the House of Lords asking for

precedents declaring Colonial Acts null and void that Shelburne laid upon the table a long list from 1676 to 1792.

There may also be noted an Order in Council giving effect to the Act passed in the last session of the previous Parliament "for the more easy and effectual Recovery of the Penalties and forfeitures inflicted by the Act of Parliament relating to the Trade or Revenue of the British Colonies in America," to which end were established thereunder four Vice-Admiralty Courts at Halifax, Boston, Philadelphia, and Charleston respectively, within certain districts according to a plan annexed to the Order. This step was naturally interpreted in America as a proof of the Government's intention to make the most of recent fiscal laws.

The temper of North's Administration and the state of public feeling behind it are aptly illustrated by the proceedings of the Committee of Council for Plantation Affairs, to which, on the motion of Lord Hillsborough, one of the most fanatical foes of the colonists, were referred in June 1770 "the disorders, confusion, and misgovernment which have lately prevailed in the Province of Massachusetts Bay." The Committee sat three times—on June 26th, June 27th, and July 4th. Its composition is worthy of note. The Archbishop of Canterbury sat on the first occasion and Lord Falmouth on the first and second. Those who signed the report were as follows : The Lord President (Lord Gower), Lord Privy Seal (Earl of Halifax), Duke of Queensberry (Lord Justice General), Earl of Rochford (Secretary of State), Earl of Bristol (Groom of the Stole), Earl of Hillsborough (President of the





LORD SHELBURNE, FIRST LORD OF THE TREASURY, 1782-3.  
From a picture by Reynolds in the National Portrait Gallery.



Board of Trade), Viscount Weymouth (Secretary of State), Viscount Barrington (Secretary at War), Lord North (First Lord of the Treasury), Mr. Speaker (Sir Fletcher Norton), Sir Gilbert Elliot (Treasurer of the Navy), Richard Rigby (Paymaster), Master of the Rolls (Sir Thomas Sewell), Lord Chief Justice Wilmot, and George Onslow (Lord of the Treasury). It will be observed that with the exception of the Duke of Queensberry, the Master of the Rolls, and the Lord Chief Justice, the Committee consisted of the colleagues of North or lackeys of his master, for the Speaker can hardly be classed as an independent, since he had but recently relinquished the Attorney-Generalship, wherein, as principal legal adviser of the Crown, he had been responsible for every false step taken by the previous Administration.

It is interesting to observe that in the catalogue of the documents submitted and in the report of the evidence the opposition to the Government is described as the "Faction." Six witnesses appeared before the Committee, viz. Captain Scott, master of the *Lydia*, engaged in the import trade ; W. Hallowell, late Comptroller of the Port of Boston ; W. Bridgeham, merchant of thirteen years' standing in the Colony ; J. Robinson, Commissioner of Customs ; T. Harrison, Collector of Customs ; and Sir F. Bernard in the pride of his new baronetcy, Ex-Governor, according to Sir George Trevelyan the source of all the mischief. It is clear that the evidence was all on one side and that no one was permitted to appear on behalf of the so-called Faction. The evidence does not seem unduly coloured from the point of view under which it

was presented, at least so far as the subordinate witnesses were concerned. Indeed, Mr. Robinson went so far as to admit that the establishment of the Board of which he was a member "was considered by many as an unconstitutional measure, because the last Revenue Laws which the board was to carry into effect were considered in that light." Mr. Harrison, moreover, stated that when he entered into office in the month of November 1766 "everything was at that time calm, but soon after, on the news of the Acts imposing duties on paper, etc., and the appointing Commissioners of Customs, the spirit of opposition revived."

Bernard followed, affirming that from August 2nd, 1760, to the beginning of July 1765, everything was regular and orderly and no Governor lived better with the people—the opposition to the Stamp Act, he alleged, was not sufficient to distress the Government, but upon the news of its repeal "the party in opposition greatly triumphed, attributing it to the disturbances they had caused." From that time, he went on to say, "the doctrine of the Colonies not being subject to taxation here began to be publicly avowed," adding that "the doctrine of the Colonies not being subject to Parliament was till then unknown." He made a point by citing Otis's book that pending the Stamp Act the right of Parliament to tax the Colony had been admitted, and asserted that in discussion at the Assembly his book had been quoted against him. At first a distinction had been made in favour of Acts of Parliament to the prejudice of the King's Instructions; then as "the new doctrines" spread, they made an exception to the advantage of port



duties which they afterwards decried, and so on in an ascending scale, which may have appeared to Bernard and the Committee as a sign of inflexible obstinacy, but with the process of events, as longer perspectives and wider horizons opened before the American outlook, formal objection and practical dissidence went down to the bedrock of conflicting theory.

In the result the Committee agreed to a report, which, after enumerating "the Instances in which those disorders do more particularly appear," declared that the instructions from the town of Boston to their representatives on May 15th, 1770, "show an evident disposition to support by force the unconstitutional doctrines which have been inculcated." Accordingly the Committee proceeded to indicate what steps naval and military should be taken to place the fortress in command of the harbour in a respectable state of defence, orders to which end were issued on July 8th to the Admiralty, Ordnance, and the Secretary at War.

Subsequently (March 28th, 1771) Governor Hutchinson's Instructions were amended in order to restrict the power of the Council of his province to act without the summons of the Governor, and forbidding his assent to any vote for the payment of money to persons appointed to negotiate the affairs of the province "in this Kingdom."

It appears that Mr. Temple, one of the Commissioners of Customs, had committed himself to connivance with the "Faction"; the questions put to elicit the action and disposition of this gentleman owe a particular interest to the fact that he came to be suspected of being the intermediary

through whom Hutchinson's letters fell into the hands of Franklin. These letters figured prominently in the proceedings of the Privy Council which arose upon a reference to the Committee of a letter from Benjamin Franklin, agent for the House of Representatives of Massachusetts Bay, and of an address therewith transmitted to Lord Dartmouth praying for the removal of Governor Hutchinson and Lieutenant-Governor Oliver.

The Committee met on January 11th, 1774, and adjourned to the 29th, when counsel were heard on both sides. It is this hearing that Sir George Trevelyan has so graphically described :

“ It was put about town that the famous advocate (Wedderburn) intended to handle Franklin in a style which would be worth the hearing. Privy Councillors attended in such numbers that they would almost have made a quorum in the House of Commons. At the bar stood rows of distinguished strangers more worthy of the title than those who are ordinarily designated by it on such occasions, for Burke and Priestley and Jeremy Bentham were among them. The ante-room and passages were thronged with people who had to content themselves with learning from the tones of his voice that a great orator was speaking contemptuously of someone. For the Solicitor was as good as his word. Leaving aside the merits of the question, he directed against Franklin a personal attack which was a masterpiece of invective. The judges in the case, encouraged by the undisguised delight of their Lord President (Earl Gower), rolled in their seats and roared with laughter. Lord North alone . . . listened with gravity in his features and, it may be believed, with something like death in his heart. Franklin, as a friend who closely observed his

bearing related, ‘ stood conspicuously erect, without the smallest movement of any part of his body—the muscles of his face had been previously composed so as to afford a tranquil expression of countenance and he did not suffer the slightest alteration to appear during the continuance of the speech.’ He wore a full-dress suit of Manchester spotted velvet which that evening retired into the recesses of his wardrobe. It reappeared on the 6th of February, 1778, when he affixed his signature to the treaty with France, by which the United States took rank as an independent nation and obtained a powerful ally.”

The composition of the Committee was larger and more representative than usual. No less than thirty-five persons signed the report. These were the Archbishop of Canterbury, the Lord President, Duke of Queensberry, Earls of Suffolk, Denbigh, Sandwich, Rochford, Marchmont, Dartmouth, Buckinghamshire, Hardwicke, and Hillsborough, Lord George Germaine, Viscounts Townshend and Falmouth, Lord North, the Bishop of London, Lords le Despencer, Cathcart, and Hyde, James Stewart Mackenzie, General Conway, Welbore Ellis, Sir Gilbert Elliot, Hans Stanley, Richard Rigby, Sir J. Wilmot, Thomas Townshend, George Onslow, George Rice, Lord Chief Justice de Grey, Sir Lawrence Dundas, Sir Jeffrey Amherst, Sir Thomas Parker, and Charles Jenkinson. Their report began with a recital of the petition, which attributed to the conduct of the Governor—

“ a tendency to interrupt and alienate the affections of Your Majesty from that Your loyal Province—to destroy that harmony and good will between Great Britain and that Colony which every honest

subject would strive to establish—and to excite the resentment of the British Administration against that Province,” etc.,

and proceeded to express astonishment—

“ that a charge of so serious and extensive a nature should have no other evidence than inflammatory and precipitate Resolutions founded only on certain letters written in the years 1767–9 to a gentleman then in no office under the Government in the course of Familiar correspondence, . . . which it was said (and it was not denied by Mr. Franklin) were surreptitiously obtained after his death,”

the conclusion being that it was only in the light of later prejudice that any objection could be made to them, and that the petition thus founded upon false and erroneous allegations was groundless, vexatious, and scandalous, and calculated only for the seditious purpose of keeping up a spirit of clamour and discontent. It would be difficult for any judicial finding to demonstrate more conclusively the irreconcilable pitch to which the parties to the dispute had now been brought, and so it must have appeared to any members of the Court who, unmoved by the abuse of Wedderburn, were not transported by passion. Dartmouth at least, who rightly possessed the confidence of the Colonies to an extent unshared by his colleagues and almost unaffected by events, must have borne as heavy a heart as Sir George Trevelyan ascribes to North.

A few days later (February 19th) Lord Dartmouth laid before the Lords of the Council (the President, Lord Chancellor, Lords Sandwich, Rochford, and North) a statement of the late proceedings at Boston relative to the tea imported



there, and several persons lately arrived from Boston attended their Lordships and were examined there-into ; but the matter being taken up in Parliament, nothing further was done in Council.

Subsequently (May 25th) the steps recommended by the Board of Trade, including a draft Instruction to General Gage for the appointment of certain persons to be the Conciliar Court of Assistants for the province during His Majesty's pleasure under the recent Act "for better regulating the Government of the Province of Massachusetts Bay," were referred to the Committee for Plantation Affairs. The Lord President, Lords Suffolk and North met on June 1st and reported in favour of the Instruction, quoting the pious trust of the Board of Trade "that this salutary measure will contribute to restore peace and tranquillity within the Province and to induce for the future a due obedience to the Authority of the Supreme Legislature." In the spirit of this sapient judgment the King in Council approved the Instruction the same day. With such a usurpation of the elementary right of self-government the recorded activity of the Council towards bringing about the final rupture comes to an end.

As the situation grew more threatening, an Order was issued prohibiting the export of munitions of war for six months, and after renewal (April 1775) for the same term, it was continued periodically for three months during the war, reserving the issue of passes for exemption upon adequate grounds. Further traces of the struggle are to be found in (1) the Order, upon a memorial of Admiral Graves, Commander-in-Chief on the North American

station, that his ships were short of their complement, with "no likelihood of completing the said complement by Volunteers," authorizing the pressing of seamen and watermen in His Majesty's dominions in North America ; (2) the Order directing the employment of five Hanoverian battalions in the Mediterranean Garrisons ; (3) the proclamation of August 23rd for suppressing rebellion and sedition ; and (4) the sad lists of pensions to wounded officers and the dependents of those killed in the War.

The question of prize law and the distribution of prize ships received early attention. A proclamation to that end was approved on December 22nd, 1775, and following upon the Act prohibiting trade with the revolted Colonies the Advocate-General was ordered to prepare (a) a Commission authorizing the Admiralty Courts to try all seizures, etc., and (b) Instructions for Commanders of his Majesty's ships and for the Admiralty Courts in the Plantations.

Attached to the Commission and Instructions is an elaborate list of interrogatories to be used in preliminary examination of persons taken on board prize vessels and other witnesses. This was supplemented on March 7th, 1777, by a reference to the Committee of an Admiralty Memorial suggesting the preparation of a Commission authorizing the Admiralty to grant commissions to privateers and of instructions to their commanders ; it was held unnecessary to give the Admiralty a commission, sufficient power being already conferred by Act of Parliament, but full instructions were approved on March 26th.

Some difficulty having arisen owing to the tardy prosecution of appeals and to their being "entered

in a private or secret manner," an Order was approved on December 15th, 1780, for transmission to the Admiralty Courts in the Plantations laying down rules for their guidance. A large number of petitions for the distribution of condemned prizes among the captors was also dealt with by the Privy Council.

In illustration of the rigour with which the Customs officers appear to have interpreted their duty, a Memorial of London Merchants was presented (February 1st, 1781), pointing out that the usual entries for the exportation of flour to New York had been refused under the Act prohibiting export when the price exceeds a certain standard, whereby his Majesty's troops, whose supply was expressly excepted in the said Act, would suffer greatly. It was of course at once ordered that New York should be considered a garrison and the necessary entrances and clearances granted.

The last echoes of the long conflict die away in the proclamations (1) declaring the cessation of hostilities with France, Spain, Holland, and the United States of America (February 14th, 1783), and (2) for publishing and declaring the definitive Treaty of Peace with France and Spain, September 26th, 1783, which was followed in December by a summary of the Orders containing complete provision for the resumption of trade relations with the people and territories of the United States of America.

With this conclusion the American Revolution may be aptly said to have staged the scene for the final appearance of the Privy Council as a principal character in great international drama.

Meanwhile, in the midst of all this turmoil, the Council were deeply concerned in meeting their obligations to Canada, the reorganization of which required sympathetic handling and an intelligent appreciation of the feeling of a sensitive and high-spirited people. To these responsibilities were added the problems arising out of the settlement of Prince Edward Island and the menace of starvation which overhung Newfoundland. In Canada there was little of an institutional character to replace, as the French Administration presented an example of government reduced to its simplest expression. The Governor-General exercised supreme military authority ; while the Intendant appears to have administered the country under the direct sovereignty of the King and so far as possible to his profit, and in him was vested absolute power in all civil affairs ; his ordinances had the force of law, the only other legal enactments being the King's Edicts or the *Arrêts* of the Council of State registered at the Supreme Council of Canada.

In the valuable collection of Constitutional Documents published on behalf of the Dominion Parliament by Professor Adam Shortt, of Queen's University, and Mr. Arthur Doughty, the Dominion Archivist, the Reports of General Murray, Colonel Burton, and General Gage, Governors respectively of Quebec, Three Rivers, and Montreal, are given in full.

Draft Instructions for the creation of Courts of Civil Judicature were considered in May 1767, and a large number of papers laid before the House of Lords at the instance of Lord Shelburne. In drafting the Instructions the Council had the



help of General Murray's advice. Their attitude was one of commendable caution, an interim report stating that the Lords of the Committee conceived it "unwise and Dangerous to the province to frame or reform laws in the Dark and upon Speculation only." The question was postponed from time to time until the required information was transmitted by Governor Carleton in September 1769, with a report of the Governor and Chief Justice of Quebec upon the laws and Courts of Judicature in the province and the opinion of Attorney-General Masères. A long list of laws, edicts, regulations, and commissions throwing light upon the constitutional progress of Canada was included, and in 1771 the whole subject was referred to the Law Officers to draw up a general plan of civil and criminal law, and a year later these persons were urged to make separate reports "with all convenient speed."

Solicitude for his Majesty's "new subjects" is shown in the settlement of the boundary between Quebec and New York; and in the matter of the grant to Sir Jeffrey Amherst of the estates belonging to the Jesuits in Canada, it was directed that the drafts of the instrument should include an engagement on the part of the grantee "to make satisfaction of such of the present possessors as were in Possession at the time of the conquest."

Missionary as well as commercial enterprise was encouraged in the new territories. A body of persons styling themselves the "Society of the United Fratrums" were granted 100,000 acres in Labrador for the purpose of civilizing and instructing the Esquimaux, and this grant was doubled a

few years later upon a report of the Board of Trade that—

“ the propagating the light of the Gospel Salvation among the Barbarous and uninstructed Tribes which frequent the coasts of Labrador is an object in every way so meritorious and the endeavours of their Missionaries appear to have been so sincere and are attended withal by so fair a promise of success from the reception they have met with.”

The Board of Trade, however, did not allow their spiritual exaltation to interfere with a due regard for temporal interests, as they insist upon the spots chosen by these missionaries being such “ as may in no respect interrupt the Fisheries carried on upon this Coast.”

In considering proposals for the exploitation of the country, remarkable regard seems to have been paid to the rights and interests of the aboriginal dwellers. Thus in dealing with a petition from Lieutenant MacDougall, a half-pay officer of the Royal American Regiment, for the grant of Hog Island, three miles above Detroit, where he had cleared fifty acres and built a house, the whole being destroyed in the Indian War at a loss of £200, the Committee affirm that no absolute grant can be made of the same consistently with the terms of His Majesty's proclamation, by which the said island is within the territory reserved and set aside as hunting-grounds for the several tribes of Indians, but they allow the petitioner a temporary occupation of the island—

“ so long as Your Majesty shall think fit to continue an establishment at Detroit, *provided this can be*

*done without umbrage to the Indians*, and upon consideration that the improvements projected by the petitioner will be directed to the more easy and effectual supply of Your Majesty's Fort and Garrison maintained at Detroit"—

no bad instance of the Committee's vigilance in subordinating private interests to the public advantage.

Again, though here the Committee's sense of justice may have been stimulated by feelings of fear, a petition of certain persons for the incorporation of a company to work the copper deposits in the vicinity of Lake Superior was treated with some hesitation, in spite of the recognition—

“ that copper is an article of great Importance to the Manufacture and Commerce of this Kingdom, on account of the Representations given of the Present Temper and Disposition of the Indians to be in a precarious state and to make it prudent to avoid all Measures that can possibly operate to increase the Jealousy and Discontent of the Savages ” ;

and it was only after prolonged inquiry and subject to the severest restrictions that the concession was granted.

A significant inquiry was instituted (March 1779) into the conduct of Sir Guy Carleton for the *removal* of Peter Livius from the office of Chief Justice “ without assigning any cause and without authority for so doing.” After a full recital of the whole case the Committee conclude—

“ that although it were much to be wished that the last of the above recited Motions had been pro-

pounded in terms more carefully guarded and to appearance not so offensive to the Governor, yet upon a full review of these proceedings, without entering into any discussion of the Authority assumed by the Governor in the mode of removal, there does not appear to us good and sufficient cause for displacing Mr. Livius especially when we consider what has been before observed, that no complaint or Imputation whatever has been preferred against him in his Judicial Capacity ”—

surely as measured and well-balanced a pronouncement as could easily be given upon such an issue.

An Order of July 16th, 1779, approves certain amendments in the ordinances of 1777 regulating judicial proceedings, and another confirms a Quebec ordinance rendering the age of majority in Canada, where it had hitherto been twenty-five, uniform with that of British subjects. An additional Instruction to Governor Haldimand of Quebec provides for the grant of lands to loyalists and disbanded troops, “ particularly in the Seigneurie of Sorel,” and the only note of discord is struck by the disallowance of an Act of Nova Scotia, for the relief of Catholic disabilities, merely however on the ground that the oath imposed was materially different from that directed by the Act of 18 George III.

A Board of Trade Report of May 1761 on a Quebec Ordinance touching the engrossment of corn contains an exhaustive account of the economic development of Canada since the occupation of the country, comparing the poverty and vassalage of the peasantry under the French régime with the spirit of industry and cultivation fostered by the British Government, it having been the constant



view and attention of their rulers to convince the new subjects of the difference between their former and their present situation.

The settlement of Prince Edward Island, perhaps owing to its temperate climate, invited a large number of applicants and was very carefully dealt with by the Council, who subsequently passed Orders for constituting the island a separate Government. Its development does not appear in the first instance to have realized expectations, as in 1783 a petition of the proprietors of land was considered praying for the remission of arrears of quit-rent and "such a suspension as the impeded progress of the island may require." After consultation with the Treasury a general remission of the alleged grievances was granted, and a draft Bill giving effect to the same was prepared and sent to the Governor to be laid before the Assembly with power to give his assent to it, when duly passed.

The condition of Newfoundland was one of chronic anxiety. In the Commission and Instructions granted to John Byron (May 3rd, 1769) the state of the fisheries is reviewed and some suggestions for their improvement made, injunctions are given for the discovery and apprehension of persons guilty of murdering Indians with a view to checking "such inhuman crimes," and a pious wish expressed that the island might be in a position "such as not to require any further Orders or Regulations," the first object of which, it is stated, ought to be "the increasing the number of Seamen and extending the navigation of this Kingdom upon which its wealth and safety depend."

Upon the petition of John Agnew, of Sheuchen,

Wigtownshire, a grant of minerals within the island and upon the opposite coast of Labrador was made to him and his associates, subject to certain conditions and restrictions; but this concession, if it was ever utilized, does not seem to have contributed to the well-being of the island, inasmuch as in June 1775 the Committee had before them a memorial of the merchants concerned in the Newfoundland fishery praying relief by introducing further quantities of provisions. Several persons interested in the fisheries were examined who described the shortage of bread and the difficulties experienced in obtaining it. One witness stated bread had been sold in the island 20s., 25s., and 27s. the hundredweight and "might now have 40s." Admiral Shulldham, Ex-Governor, declared the normal price in his time to have been 14s. to 18s. per hundredweight, and added that they had no other trade but fishing and the necessary repairs of their stages, boats, casks, etc.—a condition of things which recalls the type of community the members of which were said to subsist by taking in each other's washing.

The fluctuation of the inhabitants from 10,000 in the winter to 30,000 when the fishing was at its height aggravated the difficulty. The Committee were so impressed by the urgency of the case that they reported in favour of setting aside the restrictions of the Acts regulating the import and export of corn, and gave directions to the Customs accordingly not to interfere with the supply of a specified quantity of biscuit between certain dates.

These years were no less fruitful than their predecessors in affording instances of the disallowance

of colonial legislature ; but whatever may be said of the soundness of some decisions or the wisdom in certain cases of thwarting the reasoned wishes of communities daily growing in self-consciousness and capacity for self-government, there can be no dispute that the Committee went at length into the grounds of its action and exhausted every means of obtaining information of the character and tendency of the legislation it condemned. The advice of competent persons was at the service of the Board. Sir Matthew Lamb, Mr. R. Jackson, and Mr. W. Selwyn are successively cited as acting in this capacity. Lamb was the son of a solicitor and made a large fortune at the Bar, aided by a judicious marriage whereby he became the father of the 1st Lord Melbourne. Jackson, at one time an intimate friend of Lord Shelburne's, was known to his contemporaries as "Omniscient" Jackson in recognition of the immense range of his information. Lord Fitzmaurice mentions in his *Life of Shelburne* that he warned the House of Commons against applying the Stamp Act to America, so that his disposition towards the Colonial Assemblies may be assumed to have been friendly. The report of the Board of Trade, which the Council as a rule adopted, embodied an elaborate argument in each case, not omitting, as it would seem, anything that could be urged on behalf of the colonial view. There is a very good example of the procedure followed in a case where the subject-matter dealt with includes ordinances from Quebec and laws from Nova Scotia, the Leeward Islands, and Bermudas. It has, moreover, some special significance as it was preceded by an Order, enjoining the Board

of Trade to pursue their duty in this respect with greater regularity and despatch.

Among many others, covering a wide field of colonial legislation, two causes of objection may be frequently observed. The creation of new townships, which, if they contained a fixed number of inhabitants, established a right to separate representation in the provincial Assembly, is deprecated upon the ground that it operated to "the augmentation of the Representative Body, . . . thereby leading to all those inconveniences which have been found to arise from the encreasing greatness and disproportion of the numbers of that Branch of the Legislature," His Majesty's Council being limited and confined to "a fixt and disproportionate Number." No clearer indication could be given of the distrust with which the administrative departments at home were prone to regard the preponderance of the elective voice in colonial affairs.

A second and even more frequent ground of objection is the inclusion in any law of provision inconsistent with what was held to be the proper relation in matters of trade between the Mother Country and her dependencies. The growing rigidity of the mercantile theory was, in fact, *the* feature of the middle half of the eighteenth century. The importance attached to the so-called "balance of trade" dictated commercial policy. The first aim of international trade was that it should be so conducted as to diminish the amount of foreign imports and so paid for with the nation's gold; and that doctrine was supplemented by the conviction that a people's industry should have its eye upon the export market, by which gold would



be absorbed from the foreigner and so produce a favourable balance, upon the realization of which the mercantilist theory rested. The genius of Walpole, and the long spell of power which he and his pupil Henry Pelham exercised, gave to that policy a coherence and persistency it had never before enjoyed. Some indeed have thought that there floated before the mind of Walpole the grandiose vision of an empire subsisting on its own resources, wherein the colonies would supply raw materials and the Mother Country manufactures ; but whether this was so or not, the force of circumstances, if the theory was a valid one, led to the systematic pursuit of such an end. The increasing attention paid to the Colonies was partly the outcome of a belief that it was through them alone the balance of trade could be preserved in our favour, and colonial legislation which was calculated to affect that balance adversely was naturally regarded with jealousy and suspicion.

From 1722 to 1750 a series of statutes were designed to combat this tendency. In the last-named year the Colonial Manufactures Prohibition Act imposed the severest fetters on colonial industry just at the moment when the communities concerned had reached a stage of development when such restrictions began to gall. The injury, moreover, provoked the gravest resentment, because it was directed against the nascent industries of New England, where the spirit of independence was most pronounced.

## CHAPTER XII

### COLONIAL PERIOD (3)

THERE is still much to be traced in the colonial history of the eighteenth century which, apart from the causes of the breach between the United States and the Mother Country, sheds light upon the relations of the various settlements with the Privy Council. Thus among many other witnesses may be quoted a Virginia Act, whereby the exporters of dressed hides were relieved from certain duties paid upon their importation, which the Committee regarded as an express and avowed Act for the promotion of a manufacture. Its repeal was advised on the ground that "every attempt in the Colonies to check or Interfere with the manufactures of this Country ought in policy and Reason to be discouraged and suppressed." For the same cause an export duty on raw hides granted in Georgia is condemned as tending "to give a preference to the Manufactures of the Colony against that of Great Britain." Again, a similar principle is traced in connexion with an Act of South Carolina, which, besides giving bounties on flax, "an encouragement," says the Committee, "not only proper but commendable," also proposed a bounty of £30 per hundredweight on a linen made in the Colony, and this being a manufacture of the United Kingdom, the Committee were of opinion "that

the Establishment of it in the Colonies ought in sound policy to be discouraged."

The strength of the same conviction is evinced in the grudging spirit of the Committee's report on a Treasury minute relating to certain proposals for working coal-mines in Cape Breton Island, wherein it is stated that as a result of granting bounties upon the produce of pig-iron in order to divert the Colonies from the manufacture and forbidding the erection of slitting mills in America, "Iron is at present imported from the Colonies in the Material and returned to them in the Manufacture," and it is asked whether the grant of facilities for coal-mining would not furnish America with the only possible means of establishing a manufacture and prove an innovation in the system hitherto pursued too doubtful in the principle and too delicate in the consequences to be adopted. All petitions on the subject, it was accordingly affirmed, should be rejected.

An act for the encouragement of settlers in Georgia was disallowed—

"on the ground that however commendable such a step at the first establishment of the Colony, their Lordships no longer think it is so when so great a number of useful inhabitants of these islands, many of whom there is reason to fear are manufacturers, are daily emigrating to the American Colonies, wherefore Your Majesty from a just sense of the disadvantages which accompany such emigration has thought it expedient to make it a condition of settlement in the neighbouring Province of East Florida that the persons to be introduced shall not be drawn from this or the neighbouring Kingdom of Ireland,"

for which reason and—

“forasmuch as the Legislature there have thought fit to interfere in the disposal of Your Majesty’s property, which does of right belong solely to the Governor under the power delegated to him by his commission, the said Lords Commissioners propose that this law may be disallowed.”

It would be difficult to put into more clumsy and provocative language pretensions which at once seek to enforce conditions of settlement injurious to the welfare and expansion of the Colony, while asserting the proprietary rights of the Crown in the most naked terms of absolutism, and all for the sake of unsound economic theory.

An interesting collision with the North Carolina Legislature on similar lines turns on an Act exempting settlers coming from Europe from all taxes, public, county, or parish, “for four years; the occasion being the arrival of shiploads of Scottish families.” The reason they alleged for coming to America was that the rents of their lands were so raised that they could not live on them. The Act was disallowed “on the score of the prejudice to be apprehended to the landed interests and manufacturers of Great Britain and Ireland from the emigration of the inhabitants to the American Colonies.”

On the other hand, there were objects of colonial legislation upon which the restraining hand of the Privy Council was laid with great advantage. The inflation of the currency by the issue of paper money, an expedient easily resorted to and simple in operation, was a popular remedy in moments of



financial stringency, but its adoption met with stern reprobation. Attempts to raise money by lotteries and to regulate the price of provisions met with no greater encouragement. In one instance of the latter kind Mr. Jackson, whose opinion is quoted with approval, lays down the sound principle that "the price of provisions depends altogether on the quantity compared with the demand, and is in no man's power to augment arbitrarily for any length of time."

An important change affecting the relations of colonial Governors with the Home Administration took place about this time, for on August 8th, 1766, His Majesty in Council took into consideration the existing rules prescribing these relations, and was pleased by and with the advice of His Privy Council to revoke the same, notice of which was to be conveyed to the Governors of His Majesty's Colonies and Plantations in America to the end that those concerned should govern themselves accordingly, and His Majesty was further pleased to order that the said Governors should for the future transmit the particular or general accounts of their proceedings or of matters relative to their Government to his Majesty by one of His Majesty's Principal Secretaries of State, and withal send duplicates thereof to the Lords Commissioners for Trade, for their information, except in cases of a secret nature.

With the growth of business a good deal of confusion had, it seems, at the same time disturbed the relations of the Privy Council and its outgrowth the Board of Trade, and to meet the change "a course of office" was drawn up to regulate procedure

between the Secretary of State, the Council, and the Board, by Philip Sharpe, the Clerk of the Council, the first clause of which provides :

“ That when any laws from the Colonies arrive for the Royal approbation, they may be sent to the council-chamber, whence they will be transmitted to the Board of Trade for their report, after which, being considered and approved or rejected, they will be returned to the Secretary of State's Office to be transmitted to the Colonies.”

By this means and the prompt execution of certain other arrangements designed to remove friction and expedite the action of the Board of Trade it was hoped that present difficulties would vanish, and business go on more smoothly, while to quicken communication between the Council and the Secretary of State it was suggested that a letter from the last-named to the Lord President or from the Under-Secretary to the Clerk of the Council would meet the purpose best. This step is the prelude to the appointment two years later of a Secretary of State for Colonial Affairs. It was no doubt mainly the work of Shelburne, who, as Secretary of the Southern Department, desired to increase his control in all colonial matters, while reducing the Board to the position of an advisory and consultant body upon such matters as the Council might refer to it. “ From this time,” as Professor Andrews says, “ the importance of the Board steadily declined until it was finally abolished in 1782.” In the meanwhile, at least for the present, the position of the Council itself in relation to its colonial liabilities was not seriously compromised.

The need of a strong hand was shortly felt by the action of the Assembly of South Carolina in ordering the Treasurer to advance a sum of £10,500 out of any money in the Treasury to be remitted to "Great Britain for the support of the just and constitutional Rights and Liberties of the people of Great Britain and America," which was promptly met by the despatch of an additional Instruction forbidding the Assembly to order the issue of public money in such an illegal and unconstitutional manner. The Board of Trade report sums up the case against the Assembly with cogency and yet temperately. It was indeed clearly contrary to every consideration of financial probity to divert appropriations lying in the Treasury to what H.M. Government no doubt regarded as a seditious propaganda. The Assembly seems to have taken their rebuff with submission. At any rate, while thinking their intentions had been misunderstood, they expressed "grief and concern under the apprehension of having incurred His Majesty's displeasure," but they failed to obtain a withdrawal of the Instruction.

Four years later the dispute is recalled by an Instruction to the new Governor, Lord William Campbell, confirming that of 1770, which is explained as restraining the Governor from assenting to any Bill by which money already issued by order of the Assembly alone shall be directed to be replaced; the Assembly, it is added, cannot pretend that they are not left at liberty to frame their money Bills as they think fit.

The drift of things towards the inevitable conflict is apparent from a singularly candid report of the Board of Trade to the Privy Council in March

1768, which plainly shows that with the ambitions towards which the Colonies were tending the struggle of interests was nearing a point where the issue lay between two incompatibles. Referring to the advantages derived by the Mother Country from settlements along the sea-board, it goes on to argue against forming them in the interior, where the benefits of an established government—

“ would naturally tend to draw the stream of population, fertility of soil and temperature of climate offering superior incitements to settlers, who, exposed to few hardships and struggling with few difficulties, could with little labour earn an abundance for their own wants, but without a possibility of supplying ours with any considerable quantity ; nor would these inducements be confined in their operation to foreign emigrants, determining their choice where to settle, but would act most powerfully upon the inhabitants of the northern and southern latitudes of Your Majesty’s American dominions, who, ever suffering under opposing extremes of heat and cold, would be equally tempted by a moderate climate to abandon latitudes peculiarly adapted to the production of those things which are by nature denied to us and for the whole of which we should, without their assistance, stand indebted and dependent upon other countries.”

Few statements of policy have their intent so unreservedly disclosed or more openly acclaim mere selfish designs. It was the same with the newly acquired province of Quebec, where, while the colonists wished to press on into the interior, the Home Government desired both to avoid conflict with the Indians and to keep the settlers within reach of British trade and of British political control.



The condition under which lands were granted was a frequent subject of concern, and a general review of these was undertaken in 1773 with the object mainly of restricting the acquisition of lands from the Indians. In this connexion it is worth noting that a conditional exception was made of Quebec—

“ within which province His Majesty hath to the great satisfaction of all His Majesty’s faithful subjects there directed that the lands shall be granted in the same mode and upon the same conditions as was practised when the Colony was under the Dominion of the Crown of France ”—

a notable proof of a generous disposition towards a conquered State. Arising out of the popularity of the Privy Council with the Iroquois, an embarrassing situation was caused by a number of squaws who intruded themselves upon the Governor to—

“ hear the good words you had to say which hath afforded them great satisfaction ; they now therefore hope you will consider their fatigue in coming so far, and that his present Majesty will follow the same good steps of his royal grandfather by considering their wants according to his example and afford them clothing and petticoats to cover them, as our warriors for want of ammunition cannot take care of them as formerly.”

The evidence shows they did acquire the coveted petticoats.

Appeals to the Privy Council in its judicial capacity show a decided tendency to increase in

range and number. The acquisition of additional Colonies, growth in population and in the variety of interests characteristic of an expanding civilization, would conduce to such a result, but the increase may be partly due to the confidence entertained in this branch of home administration. Taking the fifty years from 1720 to 1770, a comparison between the number of appeals in the first decade of the period and the last shows a change from 87 to 134, and in the last years of the said half-century the number reached 23, whereas the average of the ascertained yield of previous years was no higher than 11; from 1755 to 1765 it reached 18.

A notable proportion of these appeals were in the cases of ships seized for breach of the Navigation Laws, a circumstance due of course to greater vigour in local administration; but as these laws were primarily in the interests of the Mother Country, it is at least a proof of the reliance placed upon the fairness of its tribunals that so many appeals were made to them in such cases.

The resettlement of the West Indian Isles had been effected by the ninth Article of the Treaty of Paris, whereunder the islands of Grenada and the Grenadines had been ceded to His Britannic Majesty and the partition of the islands called neutral agreed and fixed, so that those of St. Vincent, Dominica, and Tobago remained in full right to Great Britain and that of St. Lucia was delivered to France, but the arrangement by which Dominica was made a dependency of Grenada proved inconvenient, and one of the first Acts of Shelburne's administration was to deal with a petition of the

Merchant Adventurers of Bristol for a separate Government and Legislature to be established at Dominica. This was done, but at first the two islands were under a common Governor, a cause of discontent which was investigated by a Committee of Council, whose report went very fully into the exposed position of Dominica with regard to the proximity of the French possessions in Martinique and Guadaloupe and its liability to the dangers of war and the abuse of contraband trade, and put the case with such convincing force that the claims of the island to a separate Governor were recognized and the handsome salary of £3,000 allotted to his maintenance, but the part to be paid by His Majesty was charged on the  $4\frac{1}{2}$  per cent. duties collected in the island "whenever the same shall be fixed by the Assembly there."

It is a curious commentary upon the Home Government's reliance on the duties being fixed by a local Act, that in September 1783 the duties were still unlevied, the island having meanwhile for two years passed into the possession of France. An instruction was then issued to the Governors of the islands concerned recommending the passing of Acts for the purpose, and it was accompanied by a covering letter from Lord North, now Secretary of State in the Duke of Portland's Coalition Cabinet, in which with a simplicity characteristic of so many State papers of the day he proceeds to argue that at—

"a juncture when they are restored to the blessings of a British Government, and the island of Grenada in particular to the enjoyment of our Happy Constitution, they may be the more inclined to conform

to the situation of their fellow subjects in the islands where these Grants have been made.”

It may have been owing to the inferior character of the men selected, or the effects of climate in diminishing restraint, but charges of arbitrary conduct, though sometimes not established to the satisfaction of the Committee, are frequent in the West Indian Islands. Thus in the course of twelve years complaints are dealt with against Robert Melvill in Grenada, Montfort Brown in the Bahamas, John Dalling in Jamaica, Major-General Cunningham in Barbados, and George Bruce in Bermuda. The charges against Melvill, which were held to be nonproven, besides imputations of unconstitutional action in his relation with the assembly, included allegations of screening a notorious criminal and subjecting certain negroes to atrocious tortures ; the case of Montfort Brown, which was the subject of most protracted investigation, covered almost every malpractice of which a man in his position could have been guilty. The first charge, of having by his neglect suffered the rebels to capture the island of New Providence in March 1776, was held to be unfounded, and others were withdrawn, but he admitted at a critical moment of expected invasion having refused to summon the Assembly to take steps for the defence of the island, and the Committee seem to have regarded his alleged transactions with privateering as more than suspect. In Jamaica four judges petitioned against their degradation by Dalling pending proceedings in a certain matter upon which they had given their opinion ; the Committee ordered their reinstatement, and passed



a heavy sentence upon the action of the Governor, who was promptly superseded. The case against Cunningham turned upon the exaction of certain fees with the connivance of his Council. The petition asked for His Majesty's disapprobation of their conduct, "so as to deter the Members of the Board from prostituting the Honor of their High Station by obsequious compliance with the arbitrary and avaricious Inclinations of any future Governor." Satisfaction was not granted on the scale of this full-blooded rhetoric, but an Instruction to the succeeding Governor dealt with the grievance in a reasonable spirit.

In November 1781 a petition from Jamaica sets forth the great expenses the island had been at in the course of the war and the efforts of His Majesty's faithful people far exceeding their abilities, "whereby their fortunes are impaired and Revenue anticipated," and prays for relief from the sugar tax. Another echo of the war is found in an Order of the Committee to the Treasury to take effectual and speedy measures for the purchase of the Bahamas from those claiming under the original proprietors in order that loyalists from the southern provinces of America may be settled there.

Care for the aboriginal population is shown in the steps taken to invalidate the sale of lands of the Caribs in St. Vincent, "which they hold upon His Majesty's sufferance" and could not therefore alienate except with His Majesty's licence. Moreover, the interests of the free negro population were not overlooked. On the petition of a free mulatto to be heard against an Act of Dominica, its provisions were made the subject of examination.

It was proposed to place a fine of £50 on the manumission of slaves, to render free negroes, mulattos, or mustees incapable of giving evidence against white people, and to invest justices of the peace with a discretionary power of whipping, fining, or imprisoning them. According to the report of the Board of Trade, it was not held expedient to interfere with the first two provisions; but in regard to the last it was decided to distinguish the position of such persons from those in actual slavery and to associate with the two justices three or five freeholders or persons eligible to serve on juries, sworn to give a verdict according to the evidence.

Some other points of incidental interest serve to illustrate the powers of the Council. Thus proposals from Thomas Walpole for the settlement of a new Colony "at the back of Virginia" were considered in August 1769, and in the following May a memorial, signed among others by Benjamin Franklin, set forth the design of the petitioners in the purchase of a large tract of land on the River Ohio. Two years later the Board of Trade's report was before the Committee, and on the petition of the promoters of the new Colony to be heard against it, their Lordships invited them to go into the whole subject-matter in supporting the original motion.

Questions of title were investigated at length, going back to the treaty at Lancaster in January 1744 between the Governor of Pennsylvania and the Six Nations and the subsequent purchase of the lands so vested by the Crown in 1768—as well as the practice of grants to the West—from which it appeared that the Governor and Council of Vir-

ginia had made several such grants beyond the Alleghanies. A counter-claim of the Cherokees was also touched upon. Evidence was given of the number of families already settled on the territories in question, which it was stated had increased from 500 in 1768 to something like 5,000. Mr. Hannay added that his informant hardly expected to be believed, but that there were 30,000 settlers who lived without any jurisdiction. The same witness had met Colonel Washington, who had been down the Ohio three hundred miles and told him that there were a great many people settled there and very troublesome. Orders for giving effect to the Committee's report in favour of the scheme were approved accordingly. The boundaries of the new settlement, taken from the application to the Treasury in 1770, are explained in detail, and it is ordered that a separate Government is to be erected therein under regulations to be prepared by the Board of Trade. The Board's place of government for "Walpole's intended Colony of Vandalia" was considered in May 1773, and on July 3rd the Committee instructed the Law Officers to prepare a draft for the grant on the said terms. Objections taken by the Law Officers to points of detail delayed the completion of the business, and on August 12th, 1774, the last reference to the subject is a petition for the grant to be expedited. It seems strange that upon the very eve of the storm which was to overwhelm the old order, objects were being pursued which postulated its permanence.

Some interest attaches to an effort of the North Carolina Assembly "to encourage and support the establishment of a post office" in the Colony.

The Act, it is true, was disallowed owing to the provision to which the Postmaster-General objected, that in the event of the mails being stopped by any accident, the nearest resident shall be compelled to forward the mail to the next stage, whereupon "*he shall be entitled to receive from the Acting Postmaster-General of the Province one shilling for every mile he may have carried the said Mail,*" but the goodness of its intentions was admitted and the clauses granting preferential treatment at ferries and double remuneration of the ferryman were particularly commended.

That northern mirage, the North-West Passage, appears in the petition of Major Robert Rogers for His Majesty's bounty in consideration of his sufferings and service. It is shown in the petition, which was referred to the Council on February 17th, 1772, that in 1765 he had submitted to the Board of Trade a proposal "for an attempt by land to discover a Navigable Passage by the North-West into the Great Pacific Ocean," "and that he had since been employed in the interior of the continent where through his intercourse with "Numerous Savage Nations" he had collected "a great Fund of additional intelligence tending to Evince and almost positively establish the existence of such Navigable passage the discovery of which is only practicable by Land," and that in the light of this information he was convinced the enterprise could be undertaken with "a smaller number of adventurers than were formerly proposed" and carried through at a much reduced cost.

Later the Council referred the petition and the Board of Trade Report to the Treasury, but nothing



seems to have resulted, and in 1780 Rogers, perhaps worn out with waiting, contented himself with asking for lands on the Penobscot River.

An interesting argument arose in 1773 upon a Pennsylvania Act for the dissolution of a marriage : in which connexion, notwithstanding a reasoned report from Mr. Jackson, quite definite on the point of right and sympathetic on that of expediency, the Act was ultimately disallowed, it being the view of the Board of Trade that such an Act, especially in cases where no suit was instituted in any ecclesiastical Court nor any verdict previously obtained in a Court of Common Law, might become a precedent and an example for the exercise of like powers in the Colonies. A point of naturalization was decided at the same time against the Pennsylvanian Legislature.

The capture of Dominica and the adjacent islands by the French has been mentioned. Dominica surrendered to the garrison of Martinique on the outbreak of hostilities, while St. Vincent and Grenada fell a prey to D'Estaing's fleet the following year, when he swept that part of the Archipelago of Byron's ships. A cartel is acknowledged by the Council, whereby in accordance with an Act of Parliament giving effect to the articles of capitulation, certain Dutch vessels (Great Britain being at the time at war with Holland) were granted the right of neutrals for four months for the purpose of removing English property, the produce of St. Vincent, Grenada, and Dominica, cleared for any Dutch or neutral port. An instruction at the same time was given to commanders of ships-of-war and privateers not to seize such ships.

We have now reached the end of the published material bearing upon the story of the Council's development in practice, as a principal vehicle of administration, particularly in its later stages in relation to the order and prosperity of the Colonies. A few general reflections, therefore, on the difficulties encountered and the results achieved will not be out of place.

The Registers of the Privy Council afford to the eye of the student a very real microcosm of British colonial government. Imperfect as it was and calamitous as were some of its enterprises, it was on the whole the best and the least selfish the world has seen ; and that is why Great Britain has retained and drawn strength from her possessions while other Powers, as a rule, failed to do one or the other.

Her success was largely due to the operation of two tendencies. First, the political sagacity which, however faulty its instruments, determined in practice the outcome of policy ; the predominance of compromise ; the readiness, in fact, to eschew the shadow for the substance, and not to press the application of any principle to breaking-point. It was the temporary subordination of these motives to the force of accidental causes which lost the American Colonies. And secondly, the curious persistence of forms, which gave strength and coherence to lines of action often hand-to-mouth and dictated by the exigencies of the moment. A too logical people would not have condoned the large departures in fact, which the permanence of forms obscured. Forms have a life of their own, apart from the ideas of men who use them. It is through them that

*les morts parlent.* A race endowed with political insight pursues a path perhaps incompatible with any sustained idealism, but is at least free from dangerous reverence for abstract doctrines and turns a deaf ear to the specious pleadings and gratuitous speculations of *a priori* thinkers.

The more we rummage among English records and ruminate upon their lessons, the more conviction strengthens of England's sense of the past—or shall it be called her innate submission to immemorial law?

The History of the Privy Council is in very truth during many centuries the Epic of the British Nation's growth in maturity and self-expression. Composed, through the passing of dynasties and the fall of kings, of the élite of the community, it kept alive and in a sense came to embalm by sheer force of tradition the aristocratic principle under forms which have survived to this day in every branch of civil government.

No less in our colonial history than in every other department of national life and growth it is fundamentally true that *les vrais hommes de progrès sont ceux qui ont pour point de départ un respect profond du passé.*

It should not be overlooked in estimating the status and importance of the Privy Council in later years that if, like every secular institution, its ancient lustre had been dimmed by time, it was not extinguished. Certain rights, if not of the first significance, still recall the multifarious points at which it once touched the community. It was left a court of appeal from the colonial and ecclesiastical tribunals, and within the sphere of these jurisdictions

it, at least in name, received a statutory warrant by the Act 3 and 4 of William IV for the establishment of a Judicial Committee of the Privy Council, which has now for a hundred years added to the prestige and dignity belonging to it in these matters as the modern depository of a time-honoured authority. No more conspicuous example of its ability to render service to the complex organization of the Empire can be found than its recent settlement of the age-long dispute between Canada and Newfoundland on their respective rights to the littoral of Labrador.

The statute has been described as having produced the same effect on the Council's legal authority which custom has had on its political functions. In each case powers possessed by the whole body have passed into the hands of a smaller Committee of which the respective names perpetuate the splendour of their lineage.

Rights are enjoyed by the Council as the vehicle through which the constitutional powers of the Crown can be exercised, recalling the provision of the Act of Settlement that through Privy Councillors and through them alone can the Sovereign act. As an eminent writer has said :

“ They have risen, they have flourished, they have declined together. They are each circled with the halo of antiquity and point to a past greatness of which the might has departed without taking away the dignity.”

The story of a great institution becomes to a critical student imbued with the interest which attaches to a noble life and excites the same personal



emotion. It seems to have a being, a distinction, a purpose of its own, and although the creations of men often stand out from the page of history with grander proportions than their authors, they, if doomed to perish like every human birth, disguise their mortality behind forms which give *éclat* to their decay. And so, few inheritors of fame, charged with organic life, make a more vivid appeal to sympathetic interest than the Council of the English Monarchy. Its story goes back to an immemorial, almost legendary past. Its powers were brought into exercise, sometimes indeed forced into prominence, to suit the needs or answer the demands of a half-civilized age, and were by the force of events gradually attuned to the graces of a more mature ideal, to the inspiration of a finer cultural aim.

Across the course of its growth the shadows of great names are cast, and though time may tarnish what it cannot destroy, their figures still illuminate the path they trod—Simon de Montfort, William of Wykeham, Bedford,<sup>1</sup> Thomas More, Burleigh : surely, to go no further, these are names to conjure with, and they form but a small group in a galaxy of renown.

Can we ever be sure of a balanced judgment in estimating the value of ideas or forces which go to build up the fabric of national life ? And this uncertainty is notably the case during the inchoate stages of growth, when it is difficult to arrive at the conscious impulse of their direction.

Purpose figures too abruptly in these primitive ages to be assigned much weight and the root of tendency is often too obscure to be traced. There

remains only the doubtful expedient of seeking guidance from results, and these are not easy to submit to any practical test or to draw therefrom any substantial illumination. If the path of history is strewn with the *débris* of abandoned hypotheses, it is no less clouded with the mists of extravagant conjecture.

A close scrutiny of individuals leads to the belief that there is nothing so distasteful to the average man as thought. Emerson once said : " Where the Great God lets loose a thinker on this planet, then all things are at risk." Could any prospect be more disturbing to the possessor of a commonplace mind ? A deference to lack of knowledge is the touchstone of the true thinker, he knows what may be fermenting beneath it. A slipshod acquisition of facts and superficial assessment of values are all that concern the pretentious sciolist.

## CHAPTER XIII

### PRESENT TIMES (I)

WITH the peace and the long reign of Pitt that ensued the Council became more and more assimilable to what we know at this day. Indeed, Pitt was the first Prime Minister in the present sense of the words, and modern England may be said to begin with the nineteenth century and the changes it brought in its train. The entrance of a Colonial Secretary of State upon his permanent functions had led to a falling-off from the Council's business, which was now in great measure limited to judicial work or matters of special reference. It was not therefore until the challenge of Napoleon to English commerce provoked a retort, that Orders of Council of vital import attracted public attention and proved a weapon of immediate and striking effect. Curiously enough, the question was put at the beginning of this century to the present writer in the course of his official duties : " What power has the Privy Council by Order in Council to restrict commerce in an emergency or otherwise ? " in special relation to the Orders directed against Napoleon. The answer was as follows :

" In ordinary circumstances the power of the King in Council by Order to restrict commerce is exercised under statute, the goods prohibited being munitions of war, naval and military stores, and

such things as may be converted into them, including 'any sort of victual which may be used as food for man' (*Customs and Inland Revenue Act*, 1879); but in the stress and exigency of the conflict with Napoleon, the Orders appear to have had no other warrant than the public safety and the inalienable right of the Executive to secure it by any means in their power."

The principal Orders in the series are to be found in the *Annual Register*, the first (dated January 7th, 1807) issued by Lord Grenville's Ministry immediately after the Berlin decree; the second (dated November 11th, 1807) issued by the Duke of Portland's Ministry immediately preceding the Milan decree; and the third by the same (dated April 26th, 1809), which was intended to some extent to meet the remonstrances of neutrals.

In the debate in the House of Commons on Brougham's motion (March 2nd, 1812) condemnatory of the Orders and the system of licences which had grown up under them, Canning, who was Foreign Secretary when the Orders of November 1807 and April 1809 were issued, and Spencer Perceval defended them as measures of retaliation, not of policy; in Perceval's words:

"With respect to the principle upon which the Orders in Council were founded, he begged to state that he had always considered them as strictly retaliatory; and as far as he could understand the matter, they were most completely justified upon the principle of retaliation. . . . *The object of the Government was to protect and force the trade of the country, which had been assailed in such an unprecedented manner by the French Decrees.*"



The principle was applied during the last war, but upon a more modest scale, as is mentioned earlier, and duly recorded in the books of the Privy Council.

The great mass of the Council's work is done through the medium of Orders in Council and to a less degree by Orders of Council, the difference between which it is probably not going too far to say that not one man in a thousand could explain. Orders in Council are of the first rank in importance and in every case are approved by the King in Council, while Orders of Council are of humbler administrative utility and may owe their sanction to two or three councillors or in some instances to the Lord President alone; recourse is had to these when something more authoritative than a mere departmental warrant or ministerial order is required, such for instance as the sanction of a labour Ordinance of the League of Nations. In either case their validity is attested by the signature of the Clerk of the Council. It fell to the present writer to offer some advice on the subject to the Canadian Government on receiving a visit from the Secretary of Mr. Rowell, President of the Canadian Privy Council, who called to make inquiries upon points of English practice, particularly in respect of Orders of Council, which were unknown to the Dominion. Orders in Council, moreover, were not approved by the Governor-General in Council, but signed by him upon adoption by the Cabinet, the only Committee of Council apparently known to the Constitution. The present practice, therefore, led to a great congestion of business along a single channel, and it was

accordingly put to the Secretary that a system of Orders of Council might be introduced under which matters of less importance need not go to the Governor-General but be passed by the Cabinet or any other Committee of Council called into being for the purpose by an Order in Council, limiting such process to certain clearly defined classes of business.

Orders in Council are instruments of conduct for which much can be said ; they are terse in form, crisp in utterance, compact and clear, and in English legislation have of late years come much into request, as with the growing difficulty in getting Bills through Parliament they have appealed both to puzzled draftsmen and harassed Ministers as a convenient mode of forestalling or fending off obstruction ; so that the formula " it shall be lawful for His Majesty by Order " to do this or the other has become a very useful expedient, with the result of a large addition to the responsibilities of the Council. A crucial instance of this process was afforded by the London Government Act of 1899, which was rendered operative by the labours of a small Commission of three acting under and responsible to a Committee of the Privy Council, its duty being to allot areas, assign boundaries, and make the necessary financial adjustment over the whole of London. In the course of eight years (1899-1907) during which its work lasted, no less than 224 schemes and Orders were formulated and passed.

But apart from legislation, the ordinary course of administrative action is accountable for an ever-increasing number of Orders in Council ;

in some cases statutory, but in a greater degree traceable to immemorial usage or to comparatively modern convenience. Thus a very large section of Admiralty business comes before the King in Council. Memorials signed by two members of the Board are of increasing frequency, covering every branch of departmental activity and touching minute points of naval practice and procedure, in connexion with finance, discipline, patronage, and distribution of duty. Among these one of the first of any interest is that which prays the King to grant a pension for the widow and sons of Captain James Cook, the famous navigator. It runs thus :

“ This meritorious officer, after having received from your Majesty’s gracious benevolence, as a reward for his services in two successful circumnavigations, a comfortable and honourable retreat, where he might have lived many years to benefit his family, he voluntarily relinquished that ease and emolument to undertake another of the voyages of discovery in which the life of a commander who does his duty must always be particularly exposed, and in which, in the execution of that duty, he fell ; leaving his family, whom his public spirit had led him to abandon, as a legacy to his country.”

The practice is traditionally assumed to rest upon the close association of naval interests with the Crown, a theory which the investigation of past conciliar action affecting the functions and status of the Lord Admiral goes far to confirm. This title goes back to the Plantagenets, and the patronage of the Crown may perhaps be due to the lesser risk of giving its fostering care to a fleet in preference to reliance on feudal armies.

Within quite recent times these memorials have been held up or postponed for further information by direct interposition of the Crown, not, it may be noted, without good and sufficient reason, or sometimes useful amendments.

The question is often asked, and of no one perhaps more frequently than the present writer, what is meant in these days by the Privy Council? how does it function and by what process are its decisions made effective? It will be the endeavour of the next few pages to provide material for an answer more or less conclusive to these inquiries. To show the volume of its work, it will be sufficient to state that during the thirteen years ending July 31st, 1927, there has been an annual average of twenty-four meetings of the Council, at which the aggregate output for the period in the shape of Proclamations and Orders (apart from judicial Orders) was 8,121 or 624·7 per annum. Besides these evidences of activity, an average of some thirty-seven Committees undertook annually the tasks assigned to them. The subject-matter of Orders in Council in ordinary times is multifarious, touching every branch of the administrative machine and capable of being extended so as to cover any extraordinary action dictated by civil convulsion or the outbreak of war.

In process of time a whole group of Acts of more or less cognate character, such as the Medical Acts, which while confirming the charters of the Medical Corporations naturally vested their supervision in the Department of State through whose hands their charters had reached them, the Pharmacy Acts, the Dentists Acts, and the Veterinary Surgeons



Act, fell within the administration of the Privy Council.

The Medical Acts are the most important of these and the powers exercisable thereunder include :

1. The appointment (by Order in Council) of certain members of the General Medical Council and the regulation of " direct representatives."

2. The addition, on the representation of that body, of new members and the withdrawal of the right to nominate members from existing constituents.

3. The disqualification for the time being of examining bodies (medical or dental) whose standard of proficiency is reported by the General Medical Council to be insufficient.

4. The application by Order in Council of Part II of the Act of 1886 to any British possession or foreign country which in the opinion of H.M. offers privileges of practice to British medical practitioners, as to H.M. may seem just, whereby reciprocity of practice is established.

5. The direction to the General Medical Council to recognize any colonial or foreign diploma (medical or dental), and the determination of any appeals against their refusal to register colonial or foreign practitioners.

6. On default of the General Medical Council to exercise any power or perform any duty under the Acts, the notification of the same to them, and upon disregard of the directions of the Privy Council, the supersession of the Medical Council in the discharge of their functions and the assumption of them by the Privy Council.

Under the Pharmacy Acts it is the duty of the Privy Council, upon the representation of the

Pharmaceutical Society, to add to the number of "poisons" included in the Schedule of the Act of 1908, and it is also their duty to approve the regulations of the Society touching the sale of poisons and their by-laws under certain heads.

The Privy Council also approves the lists of examiners, and appoints inspectors of the Society's examinations in Great Britain and receives their reports.

By the Act of 1908 the Privy Council was empowered to issue regulations for the sale of certain poisons used in the process of agriculture and horticulture by persons other than registered chemists, and to add on their own motion substances to the list of mineral acids to be sold under certain conditions.

Appeals to the Privy Council also lie against decisions of the Royal Veterinary College refusing to register practitioners of veterinary surgery.

Besides the routine business already described in connexion with Admiralty memorials, there is not a Department of State that does not have recourse to Orders in Council. Those of more general interest cover prorogations of Parliament and Convocation, public mourning, provision for holding Councils in the Dominions on the occasion of Royal visits, matters arising out of the preparation for Coronations, such as the approval of the Order of Service and Form of Ceremonial and the extension of the fabric at the west end of Westminster Abbey, Orders and approval of Commissions for the transaction of State business during the absence of the Crown, such as was occasioned by His Majesty's visit to India 1911-12, when the Lord President, the Lord

Chancellor, Prince Arthur of Connaught, and the Archbishop of Canterbury were appointed Councillors of State and dealt with more than fifty State documents per week.

In relation to an analogous situation that might arise from the demise of the Crown during the absence abroad of the Heir to the Throne, an Act passed upon Queen Victoria's accession provided for a Council of Regency and empowered the said personage, whenever he leaves the country, to place the names of three nominees of his own in the hands of three specified individuals, one of whom is to be his own selection.

An exceptional number of Orders attended the preparations for war, and from August 3rd to 6th, 1914, days of feverish activity passed, each signalized by two Councils, the business of which traced the progress of preparation up to and in pursuance of the declaration of War on the night of the 4th. The experiences of those days proved the invaluable service of the Sub-Committee of the Committee of Imperial Defence for the co-ordination of departmental action at the approach of war, to whom it had come as a surprise that action, when war is imminent, must be preceded by a message to Parliament or a Declaration in Council, if Parliament is not sitting, that a case of emergency has arisen.

Happily for the State, the Committee concluded its labours in the previous month of June 1914 so that, with the Privy Council as its pivotal point, the collective machine, including all the departments concerned, worked with an amazing celerity, precision, and completeness, where in past times confusion, uncertainty, and hesitation had prevailed.

On Monday morning the naval mobilization was perfected by the issue of all the necessary Orders and Proclamations ; this was followed the same afternoon by the extension of the Bank Holiday for another three days and a preliminary Proclamation dealing with the export of warlike stores. Parliament having adjourned from Friday at 6 p.m. to Monday at 2 o'clock, it was held proper to regard it as not sitting, and the King that morning accordingly stated in Council the emergency that had arisen—a step that was criticized at the time in some quarters, but was deemed absolutely necessary by the officers of the Privy Council in the interests of the State. So rapidly did events move that the height of the crisis was reached on Tuesday, the 4th, when just before the meeting of the Council at 4 p.m. for the mobilization of the Army, information was furnished by the Foreign Office that an ultimatum had been presented at Berlin with the time for reply limited to midnight, when if no reply was received or it proved unsatisfactory a state of war would arise. A midnight Council was accordingly requisite, when the supreme crisis being reached, the conditional seizure of German ships in English ports was sanctioned and a Proclamation approved defining contraband. These steps it was possible to take at 10.30, as a curt refusal to comply with the ultimatum reached the Foreign Office at 10.15.

On the following day a most drastic but necessary Order was approved, under a new Aliens Act passed through both Houses in three hours, by the provisions of which the alien enemy was subjected to the most stringent restraints and supervision, including exposure to the severest penalties in event of any



breach of the regulations under which he was permitted to live. A Council on the following day was conspicuous for the introduction of Lord Kitchener into the Privy Council and the subsequent delivery to him of the Seals of the Secretary of State for War. A later Council extended the moratorium to a wider class of cases.

Among the first questions to be decided was the form in which licences for exportation of prohibited or restricted goods should be issued. The Privy Council was specially concerned, because in previous wars applications for such licences had been dealt with by that body. It was agreed to follow the practice thus sanctioned by custom, and export licences were accordingly issued in the shape of Orders in Council bearing the seal of the Office and signed by the Clerk of the Council. As the work grew in complexity, sundry changes were made in the details of the licences to meet fresh requirements, but these changes did not affect the framework of the licences, which continued throughout to be issued in the form of Orders in Council, and when occasion arose for revoking a licence, the desired object was effected in accordance with the terms of the licence—by a letter sent from the Privy Council Office signed by the Clerk of the Council.

Other matters connected with the war confided to the Privy Council were Orders for the creation of New Offices like the Ministry of Munitions, the removal of Sir Edgar Speyer from the Privy Council for improper conduct, and the investigation of cases of individual offenders under the provisions of the Deprivation of Titles Act, 1914. A Committee, consisting of the Lord Chancellor and Lords Lans-

downe, Crewe, Sandhurst, Newton, Stamfordham, and Sumner, decided to report to His Majesty the four persons named, viz. the Duke of Albany, the Duke of Cumberland, the Duke of Brunswick, and Lord Taaffe as having come within the terms of the Act, on the ground that they had during the present war "adhered to His Majesty's enemies."

The appointment of Sheriffs, one of the oldest offices in the Kingdom, whose origin goes back to the mists of antiquity, devolves upon the Council. It has three stages : (1) The nomination in the Court of the Lord Chief Justice, over which in his presence the Chancellor of the Exchequer presides, assisted by the Judges of Assize, who are charged with the submission of names. (2) The selection of the nominees called upon to serve for the ensuing year, which is arranged at a dinner given by the Lord President to his colleagues in the Cabinet. This was the dinner in the year 1820 which was designed by the Cato Street Conspirators to be the occasion of the massacre of Ministers. (3) The "Pricking," which is done in Council by the King in person thrusting a heavy gold-headed "bodkin" through each selected name on a parchment roll in the hands of the Council. On the first use of this implement King Edward evinced a keen interest in its history and asked its age. The Lord President was unprepared with an answer, when the Clerk of the Council had the quickness to reply : "It belongs to a time when your Majesty's ancestors were more expert with the sword than the pen"—an answer which was favourably received by the illustrious querist.

Proclamations figure largely both in bulk and in importance. They are of two kinds—those which

are purely formal or ceremonial, and those which have been brought into being under special circumstances or when it is sought to strike some exceptional chord of feeling in response to a particular demand arising out of stress of war or the impact of some sudden catastrophe.

To the former class belong announcements of the demise of the Crown, the dissolution of Parliament, public holidays, services of Intercession or of Thanksgiving, and Proclamations of Neutrality, but questions in connexion with one or two of these may give rise to differences of opinion. Thus, upon the occasion of the Boer War and a proposal, after the first disaster, for a Day of Humiliation as a right and proper proceeding, Queen Victoria took a very decided line, her attitude being in substance that while prayer and humbleness before God was correct, humiliation suggested a craven spirit and a confession that her country was in the wrong, a position to which she was in no circumstances willing to accede, and the title of the instrument was altered accordingly.

The Proclamation of Neutrality on the outbreak of the War in the Balkans, 1912, elicited some dissentient feeling, as the view held by the Foreign Office in the first instance appeared to be that it was an indispensable preliminary to setting in motion the provisions of the Foreign Enlistment Act, whereas in the view of the Privy Council the object of the Proclamation was not the enforcement of the law but to inform the public of their obligations and disabilities when a state of war arose, and that the executive powers of the State under the Act were exercisable just as freely before the

issue as afterwards, as soon as a state of war exists, of which the Proclamation is merely the evidence.

The Declaration of War in 1914 and the Thanksgiving at its conclusion were the subjects of Proclamations, and also the assumption of the name of Windsor by the King and the Royal Family, which was promulgated subsequent to its announcement by a Declaration in Council.

The official form of the Declaration was in these words :

“ My Lords, I think proper to declare and ordain that from this day forth the name of ‘ Windsor ’ shall be borne by my Royal House and Family, and to the same end I renounce and relinquish for Myself and my descendants the Foreign Titles and Arms of Duke of Saxony and Prince of Saxe Coburg and Gotha and in behalf of all descendants of her late Majesty Queen Victoria who are subjects of these Realms any German Dignities, Titles, Honours or Appellations to them heretofore belonging, for the due promulgation whereof I hereby signify the intent to issue My Royal Proclamation.”

An effort of the War Office to draft a Proclamation at the gravest crisis of the South African War ended disastrously for its authors, as on reaching the Privy Council Office, which had not been previously consulted, with the alleged impress of high sanction, it proved a document in which panic and hysteria were inseparably blended. Upon diligent search in the archives of the Privy Council two were found, the first at the date of the “ unnatural rebellion ” in the Highlands (1745), and the second in 1759 at the supreme moment of Pitt’s great Ministry, but neither of them gave any warrant for



the style adopted on this occasion, for a parallel to which, in respect of the note of personal, almost despairing appeal, a document was forthcoming in the first year of Charles I (1625) for the manning of the Navy. These were submitted to the Cabinet by the Lord President, by whose instructions the Clerk of the Council was able to throw into proper shape an alternative, adhering so far as possible to precedent both in form and substance, but so far wrapping up and toning down the War Office material, which could not be altogether dropped after it had met some measure of Royal approval, that it at last read with the sober dignity of a State Paper, in which violent emotion is altogether out of place. The Lord President with much relief sent it at once to the Prime Minister, and the Cabinet was unanimous in preferring it to the original draft.

A somewhat similar occasion arose in April 1917, when the Privy Council received from Lord Devonport the draft of a Proclamation on the urgency of economy in the consumption of grain. The preamble contained a passage in denunciation of the "cruel and tyrannical Monarch" it was the aim of the war to overthrow, a passage altogether outside the objects of the instrument, doubtful in taste, and not calculated to serve its purpose, which was understood to be to save the Crown in the estimation of certain persons from the suspicion of friendliness toward the German Emperor, to which obvious objection would be taken in the highest quarter. While retaining the substance of the draft, it was put into a form not open to criticism, giving it withal as much dignity and impressiveness as the object justified.

Besides these Acts of State, of which the Council-chamber is the theatre, varying in importance but in the aggregate summing up the machinery of government, based as it is upon the growth of centuries and sealed with the inheritance of ages, the Council is put to certain ceremonial uses, of the dignity and purpose of which its officers are the guardians. Thus here the Lord President of the Council, an office of which the first holder was the husband of Henry VII's widow, a daughter of France, occupies his place upon the declaration of the King in person and takes the oath of office, and here the Secretaries of State, the Lord Privy Seal, and the Lord Chancellor himself receive their seals and are sworn that they will well and truly serve the Crown in their exalted posts. The interest attaching to the Great Seal, by virtue of the secular dignity enjoyed by the holder and the sacrosanct authority of the documents to which it is affixed, transcends all others and invests the ceremony of its bestowal with peculiar interest, all the more that it is the subject of repeated renewals when the ceremony of defacing the outworn impression takes place, which is then granted as an heirloom to its last holder.

It may perhaps be acceptable at this point to give the record of the procedure as described by successive eye-witnesses in three reigns, when under William IV Brougham was the principal figure, and in that of Victoria and of Edward VII Lord Halsbury. The opportunity offers all the more inducement as both actors in the character of the Chancellor were born comedians, the first named not without a touch of the mountebank.

Charles Greville thus gives his story :

“ This King is a queer fellow. Our Council was principally for a new Great Seal and to deface the old seal. The Chancellor claims the old one as his perquisite. I had forgotten the hammer, so the King said : ‘ My Lord, the best thing I can do is to give you the seal and tell you to take it and do what you please with it.’ The Chancellor said : ‘ I believe there is some doubt whether Lord Lyndhurst ought not to have half of it, as he was Chancellor at the time of Your Majesty’s accession.’ ‘ Well,’ said the King, ‘ then I will judge between you like Solomon ; here ’ (turning the seal round and round) ‘ now do you cry heads or tails ? ’ We all laughed and the Chancellor said : ‘ Sir, I take the bottom part.’ The King opened the two compartments of the seal and said : ‘ Now, then, I employ you as Ministers of taste. You will send for Bridge, my silversmith, and desire him to convert the two halves each into a salver, with my arms on one side and yours on the other, and Lord Lyndhurst’s the same, and you will take one and give him the other, and both keep them as presents from me.’ ”

Greater decorum, it is needless to say, was observed on March 3rd, 1900, when the same ceremony was conducted before Queen Victoria. The Lord Chancellor, wreathed in smiles, received the new seal after Her Majesty had laid her hand upon it in formal token of her approval. He had also redelivered to him the defaced old seal, retiring with an odd absence of grace, as he struggled to make the proper genuflexions with the weight of two seals, nearly half a hundredweight in the aggregate, hugged to his bosom. At the Chan-

cellor's earnest entreaty the Lord President had not exerted his strength to the damage of the old seal, which will now remain an heirloom of the Giffard family, whose head was Lord Chancellor for a longer period than any of his predecessors in the Queen's reign and since the beginning of the century was only second to Lord Eldon. The new seal was extraordinarily heavy, of solid silver and very finely executed, though the figure of the Queen "regardant" holding a sceptre looked somewhat like that of the Pope blessing the Universe.

After a long delay in the preparation of the design for the new Great Seal, owing to the neglect of the King's directions that he should be consulted at every stage, which was only condoned by a reservation on the part of His Majesty as to his ultimate approval in case the impressions were not satisfactory, the completed seal was formally delivered to the Lord Chancellor on November 14th, 1904. By the King's instructions it had been arranged with the Deputy Master of the Mint that the Chief Wax<sup>1</sup> should have an opportunity of taking an impression which had satisfied the Chancellor as to the way in which the new design was cut. The King was seated, as he had a sprained foot or had a touch of the gout, but was in excellent spirits and took a lively interest in the new Seal which the Chancellor submitted to him in audience before the Council. The vivacity and agility of the octogenarian Chancellor in performing his genuflexions and supporting the weight of two Seals was astonishing. The King elected to deface the old one himself, but gave either face a very slight

<sup>1</sup> The title of one of the principal officers in the Royal Mint.





SEAL OF QUEEN VICTORIA, 1900.



tap. There are some 350 oz. of silver in each compartment, so that the old seal (and this was the second the Chancellor had acquired) becomes a valuable perquisite. Upon the same day the Scottish seal, formerly in the hands of a permanent official but now vested in the Secretary for Scotland, was handed to Mr. Graham Murray, the present Lord Dunedin.

Among Orders in Council touching the Royal Family none have more significance than the King's obligation to give his consent in Council under the Royal Marriages Act to all descendants of George II, except in the case of Princesses who had married into foreign families, upon pain of the marriage contracted without such consent being declared null and void for all purposes whatsoever. Among such were the marriages of Princess Alice of Albany (November 16th, 1903), the Duke of Coburg (February 25th, 1905), and the Duke of Cumberland (March 17th, 1912). About the second of these King Edward had some scruples on the score of the personage in question being a reigning prince, a point which it was difficult to sustain as the late Queen had declared her consent to the marriage of the Prince Royal of Hanover in 1842, a precedent certainly coming within the King's query. However, in an interview during the luncheon hour with the Chancellor, who was delightfully humorous upon the sweeping provision of the statute and the menaces of "*præmunire*" upon all who in the absence of the King's consent should aid and abet such marriages, it was affirmed that he had not the least doubt, if the Duke of Coburg was to retain his contingent rights, the King's consent was necessary. Notwithstanding this, His Majesty was at first

inclined to question the validity of the Lord Chancellor's argument, but finally agreed to take the required step.

In connexion with the later case of the Duke of Cumberland, the matter was complicated by his projected marriage with the daughter of the German Emperor, but all difficulty was removed by the bridegroom making suitable application. The Foreign Office, in acquainting the Privy Council of the circumstance, added in reference to any possible renunciations the copy of a letter addressed by Lord Rosebery, when Secretary of State to Queen Victoria, dealing with certain questions which had arisen in connexion with the marriage of the Crown Princess of Roumania wherein this passage occurred :

“ The possible union of crowns has never, Lord Rosebery thinks, operated as a bar to marriage. There is notably the case of the Empress Frederick, through whom the British and German Empires might become united, a conception so portentous that the dominion of Charles V would seem comparatively insignificant beside it.”

Princess Ena's marriage, upon the consent in Council to which King Edward had some repugnance on the score of popular prejudice excited by her alliance with a Catholic Sovereign and of the obligation to adopt his faith, was happily found to be outside the range of the statute, as Princess Beatrice's marriage took place before Prince Henry of Battenberg had become a naturalized subject of the British Crown.

Committees of the Privy Council are the constitutional *modus operandi* for the discharge of a large



share of its functions. Some of them act under statutory sanction, such as those for the Universities of Oxford and Cambridge and the Scottish Universities, for the Channel Islands, and of course the Judicial Committee created by 3 and 4 William IV. Some are called into being *ad hoc*, like the Coronation Committee and the Court of Claims ; others for purposes of inquiry or the settlement of matters that call for their intervention by petition to the King in Council. University Extension, of which the last thirty years have seen so much, is among the most important of the subjects thus handled. Nearly seventy years had passed since the last move in this direction, when, according to Greville, the Privy Council met on April 24th, 1831, to hear the Petition of London University praying for a Charter and the counter-petitions of Oxford and Cambridge and the medical bodies.

“The Assemblage,” he goes on, “was rather curious, considering the relative political position of some of the parties. All the Cabinet Ministers were summoned ; Lords Grey and Holland were there, the Chancellor, Denman, Lyndhurst, Eldon, the two Archbishops and the Bishop of London. Old Eldon got a fall as he came into the House and hurt his head. Brougham and the rest were full of civilities and tenderness, but he said, ‘it was of no consequence, for the *brains* had been knocked out long ago.’ Wetherell made an amusing speech and did not conclude. It is seldom that the sounds of merriment are heard within these walls, but he made the Lords laugh and the gallery too. There were Allen of Holland House and Phillpotts sitting cheek by jowl. The extreme gravity of old Eldon struck me forcibly as contrasted with the air of *ennui*, the

frequent and audible yawns, and the flippant and sarcastic interruptions of the Chancellor. The most striking incident occurred in an answer of Bickersteth's to one of the Chancellor's interruptions. He said, talking of degrees, 'Pray, Mr. Bickersteth, what is to prevent the London University granting degrees now?' to which he replied, 'The universal scorn and contempt of mankind.' Brougham said no more; the effect was really fine."

In the present case a less flamboyant course was followed. The petitions for the incorporation as separate Universities of Owens College, Manchester, and the Liverpool College, heretofore constituent parts of the Victoria University, which also comprised the Yorkshire College at Leeds, were referred to a strong Committee consisting of the Duke of Devonshire, Lord Rosebery, Lord Balfour of Burleigh, Lord James of Hereford, and Sir Edward Fry, who gave a patient hearing to the objections of the Yorkshire College ably voiced by Lord Ripon and Mr. Arthur Acland, and finally decided in favour of the petitioning bodies so as to form three separate Universities, to which was subsequently added a fourth under the name of the University of Sheffield. Birmingham, under the ægis of Mr. Chamberlain, had been the first to obtain incorporation, and in no long time after the formation of the four Northern Universities Bristol established its claim to another. A petition from Wales for the incorporation of a National Museum, to the location of which Cardiff and Swansea put in rival claims, was dealt with by a smaller Committee, of which Lord Balfour of Burleigh and Lord Jersey were the principal members, Aberystwyth about the same time being made

the seat of a National Library by the Act of the Privy Council.

At the opening of each reign the Coronation Committee, to which an executive body composed mainly of officials under the presidency of the Earl Marshal is now attached, and the Court of Claims for the settlement of conflicting pretensions, were both emanations of the Privy Council, the first consisting of the most important members of the Ministry and the great Officers of State, while the second included the strongest elements of the Judicial Committee, with the Lord Chancellor in the chair and the Earl Marshal for their guidance on ceremonial points.

A smaller Committee had previously been responsible for the changes in the Prayer Book,<sup>1</sup> which enjoyed the assistance of at least one of the episcopal councillors. In the case of King Edward, it may be interesting to observe, as to the usual form of the Order exhorting ministers of the Church of Scotland to pray for the King, His Majesty was not styled Edward *VII*, so as to avoid wounding the susceptibilities of the Scots by the implicit reference, however distant, to Edward I !

A project was on foot at one time to invest a Committee of the Privy Council with the authority to license plays in lieu of the Lord Chamberlain,

<sup>1</sup> By the Act of Uniformity (14 Car. II, c. 4, A.D. 1662), the Council is made responsible for alterations made from time to time in the Prayer Book : " 21. PROVIDED alwaies . . . that in all those prayers litanies and collects which doe any way relate to the King Queene or royall progeny the names be altered and changed from time to time and fitted to the present occasion according to the direction of lawful authority " (i.e. the Privy Council).

and a conference was held at the Office of the latter, in which Sir Douglas Dawson, Comptroller in the Lord Chamberlain's Department, the Clerk of the Council, Sir Charles Matthews, and Mr. Byrne of the Home Office, took part, but no practical conclusion was reached.

A scheme of different scope which proved a great success was the formation of a Baronetcy Committee, dependent on a new warrant based upon the report of a Committee, now some years old, over which the late Lord Pembroke presided most efficiently. A preliminary difficulty was met with in a difference of opinion on a point of form between the Home Office and the Earl Marshal, which was dealt with very easily by a small body of Privy Councillors consisting of Lord St. Aldwyn, Lord Dunedin, and Sir John Kennaway. It appeared upon their first meeting that the Royal Warrant had been hung up owing to the sturdy opposition of the Earl Marshal on behalf of the College of Arms ; that resistance was finally concentrated upon the point whether the custody of the roll of Baronets should rest with the Home Office, as recommended by Lord Pembroke's Committee, or whether it should be kept by the College of Arms, which the Duke claimed as part of the indefeasible right of the Earl Marshal. The King professed himself ready to sign the warrant, but as a matter of courtesy first gave a hearing to the Duke, Mr. Herbert Gladstone being also present. It became an oral tournament on the steps of the throne. The Duke flung himself into the fray with characteristic earnestness, and floored the Home Secretary by producing quite unexpectedly a letter from Lord Pembroke withdrawing on his own part





SEAL OF KING EDWARD VII.



and that of his colleagues the particular recommendation to which the Duke objected. The King thereupon wanted something more than Mr. Gladstone's support, and most prudently had recourse for advice to a Committee of the Privy Council.

After hearing the Duke of Norfolk, Lord St. Aldwyn proposed a compromise upon one point, providing for a report from the Heralds' College, Lyon, and Ulster respectively on every claim to a succession originated severally in the three kingdoms, but told the Duke plainly the Committee were not with him in his challenge to the competence of the Warrant, as the matter in question lay plainly within the Royal discretion.

The Committee met again to settle the terms of their Report to the King, deciding with some regret against the Earl Marshal on his plea for retaining the requirement of coat armour for persons created Baronets. The Duke, who was not present, put in a final protest against the way in which he had been treated by the Home Office, their slackness in giving an answer to his first objection, which was delayed for two years and a half, being the real cause of the stiff line he afterwards took. Upon this Lord St. Aldwyn commented sympathetically and there left it. "Mr. Asquith," he said, "would have settled in a quarter of an hour what it had taken three years to dally with."

The object of the roll when it came into effect was to exclude persons of doubtful title, many of whom, it was feared, had crept into recognition. A strong permanent Committee was appointed to deal with these cases of uncertainty, which it did

with marked success, investigating many which presented features of real obscurity. These were as a rule confined to Scotland, as it appeared to have been the practice to grant baronetcies of Nova Scotia to heirs without restriction, thus involving the scrutiny of claims, where the claimant might prove to be the descendant of a generation or two senior to the original grantee.

The constant occurrence of interesting points made these hearings a real pleasure to follow, and the mode of conducting them reflected great credit upon the patience and acuteness of the tribunal, which was limited to five. One case was settled without a hearing, viz. that of Cope of Hanwell, a baronetcy that has for generations been associated with the possession of the princely palace of Bramshill.

In illustration of the jealousy with which the Privy Council guards the exclusive privilege to appoint committees of their own number, it is enough to recall a design of the Board of Education to appropriate the process for the constitution of a Body to be charged with the distribution of certain sums provided by Parliament for the organization and development of research, devoid, as it seemed, from any functional responsibility to the Council as a whole, when the Board was promptly reminded of the facts of the situation.

An exercise of the powers of the Crown through the medium of the Privy Council, perhaps one of the oldest, lies, as we have seen, in the grant of Royal charters upon petition to the King in Council, or in some circumstances upon the Royal motion itself. Of these it may be as well to give certain further



examples illustrative of the range covered and the public utility of the process. In connexion with University Extension several have already been offered, and it is unnecessary to mention at any length those bestowed under the Municipal Corporations Act, which, though frequent in number and touching important local interests, are for the most part matters of mutual arrangement with what is now the Ministry of Health. In only one instance within the writer's memory was another authority invoked, when the old Local Government Board dissented from the Lord President's proposal to grant a charter to the ancient borough of Fowey, which under the great Elizabeth had contributed several ships to the overthrow of the Armada, and the two members of the Privy Council who belonged to the Council of the Duchy of Cornwall contributed by their votes to the verdict in favour of incorporation.

Charters of recent date were granted to such widely different institutions as the disestablished Welsh Church, the British School at Rome and a similar organization in Florence, and, with the special interest of King Edward, to the Society for the Protection of Birds. The status of an important musical body was involved in the application of Trinity College, London, an institution which had the support of the late Lord Alverstone and other prominent names, but was refused its prayer upon a hearing before a strong Committee consisting of Lord Crewe (in the chair), Lord Crawford, Lord Wrenbury, Sir Edward Goschen, and Sir F. Ponsonby; the opinion of such musical authorities as the Royal Academy of Music, the Royal College

of Music, the Guildhall School, and the Incorporated Society of Musicians was invoked. Affidavits on either side were as thick as bees, but the opponents had the advantage of Sir John Simon's crafty and persuasive eloquence, beside the great weight of musical authority, including the evidence of Sir Hubert Parry.

An important step in the direction of giving literature an authoritative centre of influence had the encouragement of the Privy Council in the form of a charter promised upon adequate evidence of support of a body styling itself "the British Academy." Some prominent people wished to see the grant take the shape of an organization within the ambit of the Royal Society in some sort of relation such as the *Académie Française* and other bodies stand towards the *Institut de France*, but it seemed more congenial to the British temper to maintain the new chartered institution in complete independence, although to this day it is indebted to the courtesy of the Royal Society for the premises it uses. So far, however, the Academy has more than justified its existence and now enjoys the distinguished presidency of Lord Balfour.

The Imperial War Conference which met at the Colonial Office in the summer of 1918 had under consideration a scheme promoted by the Ministry of Reconstruction for the establishment of an "Imperial Mineral Resources Bureau," which it had been suggested should receive its constitution under a Royal charter, and at the request of the Secretary of State the Clerk of the Council was in attendance. The question of finance was of course a prominent

feature of discussion, upon which a good deal of sensitiveness was displayed, Mr. Meighen, who raised the subject, wanting to know what security there was against the large increase of the guaranteed expenditure by a body so organized. It was easy, of course, to show that a provision could be inserted in the financial section of the charter limiting the liability of the Dominions to, say, 50 per cent. in excess of the thousand pounds contemplated as the share of each towards current expenses, without reference to the State concerned for special sanction. A further meeting ensued, at which the Clerk of the Council was again present and addressed the conference on the value of a chartered body as the depositary of the powers and functions with which it was proposed to invest the Mineral Resources Bureau.

Mr. Burton, of South Africa, was not altogether convinced, and both he and Mr. Meighen (Canada) appeared to fear that the constitution of the Bureau in such a form would take the scheme beyond the tentative and experimental stage, which for the moment was all they thought called for. Australia and New Zealand, on the other hand, were in favour of its being given permanent shape from the outset, as a guarantee for the ultimate development of its potentialities ; they did not share, moreover, the financial scruples of their colleagues. Ultimately Mr. Long made the acceptable suggestion of a small representative sub-committee to bring about an agreement as to the financial footing upon which the charter was to rest. In the result it was decided to proceed by charter, the financial arrangements being left for three years in a somewhat nebulous

state. Neither Mr. Rowell (Canada) nor Sir J. Ward, the spokesman of New Zealand, was satisfied from opposite points of view, but they both accepted the amended resolution as in terms the only available compromise—a distinct triumph for the Privy Council.



(Left to right) Viscount Dunedin, Viscount Haldane (deceased), Earl of Birkenhead, Viscount Cave (deceased), Lord Moulton (deceased).



(Left to right) Lord Atkinson, Viscount Cave (deceased), Viscount Haldane (deceased), Viscount Dunedin, Mr. Justice Duff (Canada).

#### THE PRIVY COUNCIL (JUDICIAL COMMITTEE).

From photographs supplied by Lord Dunedin.





## CHAPTER XIV

### PRESENT TIMES (2)

It is one of the oldest traditions of British colonial policy that in default of any positive provisions for the purpose, the administration of the Dependencies is in the hands of the King in Council, and in the absence of any direct authority on the point the Government of the mandated territories granted to Great Britain under the Treaty of Versailles came to be treated upon these lines. Thus in the summer of 1922, among the Orders in Council to which legal sanction was given, three were of signal interest and importance, viz. those granting a Constitution to Palestine and furnishing the Governor with instructions for giving effect to the new order of things. The difficulty of composing within one instrument the claims of jealous races and contending creeds was met with great wisdom and adroitness, and the adjustment of rival pretensions is conspicuous witness to the prudent statesmanship that has watched and tended the growth of the new State. It was not without a thrill of real emotion that the hand of the present writer was set to the documents by which the King in Council inaugurated a new and most hopeful departure affecting the sacred land of which Moses was the first lawgiver.

An earlier invocation of the same authority goes back to 1829, when, upon the prohibition of *suttee*

by an edict of Lord William Bentinck's Government, certain influential Bengali gentlemen put themselves into vigorous opposition and did not hesitate to carry the fight for the preservation of the practice to the Court of last resort—His Majesty's Privy Council.

Some adequate notice of the Judicial Committee is now due. The Court was called into being by the 3 and 4 William IV for the hearing of colonial appeals, which had by this time so increased in volume and importance as to make a change necessary from the haphazard method hitherto followed in connexion with appeals to the Crown in Council. There was also assigned to it by a later statute appeals from the ecclesiastical Courts, with which object the Church Discipline Act, as amended by the Appellate Jurisdiction Act, provided for the presence of such prelates as were Privy Councillors in the form of assessors.

The Lord President, all members of the Privy Council as hold or have held high judicial office, the Lords Justices of Appeal, and certain special members appointed for the most part to hear Indian Appeals, compose the tribunal. In addition to the matters mentioned above, their jurisdiction embraces all concerns in Admiralty or Vice-Admiralty Courts in the domain of the Crown, and includes any other subject that may be referred by the Crown to the Judicial Committee for hearing and consideration.

Colonial appeals date from the Restoration as an expression of the inherent power of the King in Council to deal with all such by virtue of his office. A judgment of the Judicial Committee is a statement of the reasons which determine them in advising



(Left to right) Sir John Edge (deceased), Viscount Cave (deceased), Lord Phillimore, The Syed Ameer Ali (deceased).



(Left to right) Lord Parmoor, Viscount Sumner, Lord Wrenbury, Sir Arthur Channell.

# THE PRIVY COUNCIL (JUDICIAL COMMITTEE).

From photographs supplied by Lord Dunedin.





“ the King to give effect to their decision.” In the report to His Majesty their conclusion is set forth and the method proposed for giving effect to it. On the report being submitted to the King in Council and approved, an Order in Council is made reciting the report and affirming it as the judgment of the King in Council. The decisions of the Committee are thus in the form of advice to the Crown, which upon a meeting of the King in Council becomes the substance of an Order registering the King’s judgment. In submitting that advice, no record of dissentient opinion is permitted. The rule is not a mere matter of policy, but is one of the “ Orders to be observed in Assemblies of Council ” made in 1627, which have never been altered or repealed, and were reaffirmed by Order in Council 1878 :

“ In voting of any cause,” it runs, “ the lowest Councillor in place is to begin and speak first, and so it is to be carried by most voices . . . (because every Councillor hath equal vote there) . . . and when the business is so carried, no publication is afterwards to be made how the particular votes and opinions went.”

It is among the indefeasible rights of the Council upon every necessary occasion to consult the Law Officers of the Crown, a right which is found invaluable in the treatment of the many problems, administrative and legislative, which adhere to the Council in the ordinary process of business. Civil suits absorb the vast proportion of the Judicial Committee’s activity and do not as a rule excite much general interest, nor in any case would it be possible, if they did, with the space at the writer’s disposal, to give many examples, but there is one

which in a pre-eminent degree falls to the lot of the historian to commemorate. The Privy Council indeed played a very memorable part in shaping the destinies of the Canadian Confederation. The Act establishing it was little more than a skeleton, to which it was left to later forces to add form and substance. The mind of a master and the hand of a great craftsman were needed to endue it with a lasting and expanding virtue, and at the right moment the master-mind appeared in the person of Lord Watson, then a Lord of Appeal and a dominant figure on the Judicial Committee. Like the prophet of old, he had the daring to ask himself, "Can these dry bones 'live'?" and proceeded to vivify their framework with the impulse of a progressive interpretation. The Committee were kept busy with one petition after another, to be followed in due course by an illuminating judgment which dissipated doubt and crystallized opinion, until a Constitution grew up which for sixty years has weathered the storm and stress of time and given to the Dominion a *point d'appui* from which she can fearlessly confront the future. Lord Haldane thus celebrates his achievement<sup>1</sup>:

"Almost from the first Lord Watson took the lead in the decision of these appeals. He worked out a different view of the Canadian Constitution from that which had been foreshadowed by the Canadian Courts. He filled in the skeleton which the Confederation Act had established and in large measure shaped the growth of the fibre which grew round it. He established the independence of the provinces and of their executives. He settled the

<sup>1</sup> *Education and Empire*, pp. 138, 139.

burning controversies as to the Liquor Laws, and as to which Government, Dominion or Provincial, had the title to gold and silver. His name will be long and gratefully remembered by Canadian statesmen. . . . He was *the* Privy Council Judge *par excellence* ” ;

and so he proceeds :

“ He never failed in the endeavour to interpret the law according to the spirit of the jurisprudence of the Colony from which the appeal came.”

Another which at the moment recalls itself to memory was Lord Sumner’s judgment in the Rhodesia lands case. He unravelled the complicated issue with great skill and pronounced the decision of the Court in terms of impressive weight ; on the whole, the finding was a distinct advantage to the Company. Lord Loreburn, who presided at the hearing, dissented from his colleagues, and while agreeing with them that the Company had no possessory title, would not have given a penny for the expenses of administration.

One of the most important as well as one of the most generally interesting of the matters specially referred to the Judicial Committee in recent years was the dispute between Canada and Newfoundland as to where the boundary of Labrador should be drawn, which was heard in 1926.<sup>1</sup>

The origins of the dispute lay far back in the early history of Canada. By the Treaty of Paris of February 10th, 1763, the King of France ceded to Great Britain “ Canada with all its dependencies as well as the Island of Cape Breton and

<sup>1</sup> This note, with what follows on the subject, was supplied by the kindness of Mr. Wallace, Chief Clerk in the Judicial Department.

all the other islands and coasts in the Gulf and River of St. Lawrence, and in general everything that depends upon the said countries lands, islands, and coasts"—a description which included the whole of the great Peninsula of Labrador, except such parts of it as were at the time the property of the Hudson's Bay Company. By a Commission of April 1763, under an Order in Council of the previous March, the "Coast" of Labrador was put under "the care and supervision . . . of Newfoundland," and in effect handed over to her. The question upon which the decision of the Privy Council mainly turned was as to what was comprised in the word "Coast," which was never defined in this or any of the subsequent administrative documents cited in the course of the case. Put shortly, Newfoundland's contention throughout has been that in the circumstances it meant a great part of the interior of Labrador, and Canada's that it meant only a strip one mile deep along the sea.

Until the nineties of the last century the ownership of Labrador was not a matter of great interest to either Dominion. In recent years, however, the demand for paper and its largely increased manufacture from timber pulp and the development of hydro-electric power drew attention to the vast possibilities of this hitherto desolate land; and rumours of mineral wealth also began to attract curiosity. In 1892 the subject was discussed at the Halifax Conference, but no solution was reached, and so things drifted until 1903, when the issue by the Government of Newfoundland of a licence for cutting timber in the neighbourhood of the Hamilton River brought the whole matter up as a practical question. Prolonged negotiations for a settlement between the two Governments extending over nearly a quarter of a century resulted in failure. In the course of these it is interesting to note that Newfoundland offered to part with the sovereignty of the region for about £6,000,000; an offer which (as events proved, fortunately for her) was rejected at Ottawa. So long ago as 1904 the Colonial Office indicated that they considered that the quarrel was a

proper subject for special reference to the Judicial Committee, and the proposition was favourably entertained by both the disputants. The terms of the reference, however, proved a matter of difficulty, and, the war intervening, more than twenty years elapsed before they could be put into a shape agreeable to both Dominions.

Finally, in 1925, agreement upon the terms was arrived at, and an Order in Council of July 24th, 1925, referred to the Judicial Committee the question: "What is the location and definition of the boundary as between Canada and Newfoundland in the Labrador Peninsula under the Statutes, Orders in Council, and Proclamations?"

The reference was heard in October and November 1926 before a Board consisting of the Lord Chancellor (Viscount Cave), Viscount Haldane, Viscount Finlay, Viscount Sumner, and Lord Warrington of Clyffe. The case for Canada was conducted by the Right Hon. H. P. Macmillan, K.C., and several other counsel, and the Right Hon. Sir John Simon, K.C.V.O., K.C., M.P., led for Newfoundland. The arguments lasted for some fifteen days, and on March 1st, 1927, the elaborate and exhaustive judgment of the Board was delivered by Lord Cave in favour of Newfoundland upon practically all points, deciding that "according to the true construction of the Statutes, Orders in Council, and Proclamations referred to in the Order of Reference, the boundary between Canada and Newfoundland in the Labrador Peninsula is a line drawn due north from the eastern boundary of the bay or harbour of Ance Sablon as far as the fifty-second degree of north latitude, and from thence westward along that parallel until it reaches the Romaine River, and then northward along the left or east bank of that river and its head waters to their source, and from thence due north to the crest of the watershed or height of land there, and from thence westward and northward along the crest of the watershed of the rivers flowing into the Atlantic Ocean until it reaches Cape Chidley."

The decision naturally caused some disappointment in



Canada, but on the whole it was received with good grace ; the care and impartiality displayed by the Board was universally acknowledged ; and the value of the Judicial Committee in the Imperial machinery was once more conclusively demonstrated.

Another occasion of special reference arose under curious circumstances when the Judicial Committee sat in obedience to a command from the King, to whom the House of Commons had presented an address begging His Majesty to assent to such a command, in order to determine whether Sir S. Samuel had forfeited his seat, a point involving a possible fine of £46,000.

There was at first some chance of the Court being divided, Lord Loreburn and Lord Halsbury being for the avoidance and Lords Haldane and Dunedin inclined to the other view, but after Sir R. Finlay wound up the argument and Lord Dunedin, as junior member of the Court, was asked for his opinion, it was given against Samuel and Lord Haldane followed suit. The question then arose in what form the House of Commons should be told what advice the Judicial Committee had tendered and whether His Majesty would be graciously pleased to direct in Council that the finding of the Judicial Committee be communicated to the House of Commons.

The Judicial Committee having stated in open Court their conclusions with full reasons and the advice which they proposed to tender to the King in Council, the next step would be to hold a Council immediately after the sitting of the Judicial Committee, when His Majesty would direct the Home Secretary to lay the report on the table of the House

of Commons as a Command Paper. Accordingly the Judicial Committee met at 10.30, the Lord President (Lord Morley) presiding for the pronouncement of the opinion, supported by the statement of reasons which had been prepared by Lord Loreburn, the Lord Chancellor taking some twelve minutes in delivering the decision. A Council was held shortly afterwards in order that the House of Commons should learn His Majesty's communication as soon as they assembled.

Throughout these transactions Lord Morley took the most scrupulous care to consult the King's susceptibilities, and displayed the utmost assiduity to avoid the least semblance of treating him as part of the machine without will or initiative.

The history of ecclesiastical appeals since the Reformation is summarized on a previous page, and, as we have seen, the procedure then established remained untouched till 1832, when, having first been transferred to the King in Council, their hearing was vested in the Judicial Committee by the Act of the following year.

It is not a little curious to note the perennial interest excited by theological controversy, both among believers and the indifferent, in illustration of which it is enough to point out that, beyond the range of politics, there is no single topic in the whole course of Greville's *Memoirs* treated with so much fulness and textual deliberation as the Gorham case, which occupied the Privy Council from January 1850 until judgment was pronounced on March 9th, although no one at this date would maintain that the form in which the question presented itself was of first-rate importance. As a specimen, there-

fore, of the mode in which a conspicuous ecclesiastical case was conducted in the Privy Council at this date it is worth while for the purpose of these annals to give Greville's account of it in as condensed a form as possible. He justifies the space allotted to it on the score of the great interest it excited, "on which," he says, "it is desirable that there should be some authentic account especially in regard to those parts of the proceedings not publickly known." The Dean of the Arches, Sir Herbert Jenner, had given judgment in favour of the Bishop of Exeter, and Mr. Gorham had appealed to the Privy Council, on which the first step was to form a competent Court. The two Archbishops and the Bishop of London were of course invited to attend as assessors in order to assist the Court with their opinion, though the Bishop of London, for reasons which will appear later, would have preferred their attendance being dispensed with.

To constitute the Court it was decided in the first instance, after consultation with Lord Lansdowne, the Lord President, that the whole of the Judicial Committee should be summoned with the intimation that their presence was not imperative. Some difficulty was experienced in securing the attendance of a Common Law Judge, which was thought necessary in accordance with the practice of the Delegates whose functions the Committee of Council had inherited, but at last Parke was prevailed upon to give up an engagement in the country in order to complete the Court, which was finally composed of Lords Langdale and Campbell, Vice-Chancellor Knight Bruce, Baron Parke, Dr. Lushington, and Mr. Pemberton Leigh (afterwards

Lord Kingsdown). Lord Lansdowne attended on the first day in order to open the proceedings, when he took occasion to explain the presence of the Prelates on so important a case, and while not intending to protract his own attendance, as he did not feel himself competent to act as a Judge, he ventured to assure the Court of his willingness to render all the assistance he could in arranging their proceedings.

The case was then very elaborately and ably argued by Turner for Gorham and Baddeley for the Bishop, though the latter concluded his speech by an "injudicious and indecent" attack upon the Archbishop of Canterbury, whom he accused of having given a living to a man holding the opinions of Gorham and therefore prejudiced in such a case. The Archbishop, "with some emotion but very mildly," affirmed that he had given the living to the man in question before he had written the book said to contain these opinions, of which he knew nothing. Baddeley made a sort of apology, and Lord Campbell rebuked him with some severity, but at the same time acknowledged the ability of his speech and with this exception the moderation of its tone. On the conclusion of the arguments the Prelates asked for time to consider their opinions and give them in writing. It was therefore agreed that they should meet again on February 15th to submit these opinions to the Committee, on whose behalf it was arranged that Lord Langdale should draw up the Report. "There was not," Greville adds, "much discussion, but it was clear that the judgment would be reversed."

Upon reassembling, the Archbishop of Canter-

bury opened with an " excellent " paper, wherein he showed that opinions, if not identical, yet very like those of Gorham had been held by a host of great and good churchmen, and he was strongly of opinion that the Bishop was not justified in refusing to induct him. The Archbishop of York was on the same side, but more feebly. Then came the Bishop of London, who was with his brothers so far as they had gone, and intimated that his first impression had been the same as theirs, but in looking more closely into Gorham's views he had reached the conclusion that he had gone beyond what had ever been held by any of the distinguished persons whom the Archbishop had quoted, and had distinctly laid down positions inconsistent with the efficacy of the Baptismal Sacrament. He therefore gave his opinion, though a somewhat qualified one, against Gorham. The Lords thanked the Prelates, asking for copies of their papers, and then proceeded very briefly to state their own views. Langdale dissented from the judgment of the Court below, Baron Parke followed with a very good written argument agreeing with Lord Langdale, and Lord Campbell took a similar line. Lushington was on the same side with a short speech in which he pronounced a strong opinion against the Bishop, setting forth the great peril to the peace of the Church from a judicial declaration that Gorham's opinions were clearly proved to be heretical. Knight Bruce was strongly in favour of the Bishop and for affirming the judgment of the Court below. Pemberton Leigh, who had not been prepared with an express opinion, was however decidedly in favour of reversing the judgment, showing most clearly that if there



were some answers of Gorham which appeared to bear out the Bishop of London's views, there were others by which they were neutralized and in which he gave an unqualified assent to the doctrines which the Bishop alleged that he rejected.

Some conversation of a very amicable character is said to have ensued, and it was settled that Lord Langdale should prepare a judgment in accordance with the prevailing views, the Bishop of London putting in a *caveat* that nothing should be said condemnatory of the Bishop of Exeter's doctrine, at which all exclaimed that they would take care that nothing of the kind was done and would steer as clear as possible of any statement of doctrine, grounding their judgment on this, "that it had not been proved to them that Gorham had put forth any doctrine so clearly and undoubtedly at variance with the Articles and formularies as to warrant the Bishop's refusal to induct him."

Lushington went so far as to say that he had the greatest difficulty in making out what Gorham's doctrine really was, and he was much struck by the fact that in no part of the Bishop's pleadings did he say explicitly with what he charged him.

Of the Court's meeting on March 8th for the delivery of the judgment, Greville gives a graphic picture :

"The Crowd was enormous, the crush and squeeze awful. I accommodated my friends with seats in court and there were Wiseman and Bunsen sitting cheek by jowl, probably the antipodes of theological opinions."

The Lords had met an hour before and made some alterations in the judgment, with certain

judicious omissions. The Bishop of London gave a pitiable display of hesitancy and vacillation, which brought home to his colleagues the earnestness of the conviction announced at the outset, that it would have been better if his attendance had been dispensed with. After wavering and wobbling like one distracted—

“half assenting and half dissenting, being on and off, by turns against Gorham and against the Bishop, disagreeing with everybody and everything, finally he sent his determination through [Dr.] Lushington, announcing (as was said in the judgment) that he could not concur,”

though he still entertained some uncertainty as to the appellant's doctrine. He and Vice-Chancellor Knight Bruce were therefore the sole dissentients, the rest of the Court, including the two Archbishops, being against the Bishop, but as some salve to his feelings it was unanimously agreed to say nothing about costs.

Some ten years later a move was made in a similar direction to put an heretical taint on the work of several authors known as *Essays and Reviews*, to which end some perfectly harmless propositions were invoked, but it met with even less success than in the case of Gorham. Of Lord Westbury, who presided at the trial, it was subsequently said that he took away from orthodox members of the Church of England the last hope of eternal damnation.

A clerical trial of different character and much more recent date came before the Privy Council in April 1921 upon the appeal of Archdeacon Wakeford against the sentence of a Consistory Court for mis-

behaviour. It was remarkable for the legal eminence of the Privy Councillors who took part in it ; thus Lord Birkenhead presided with great dignity and had the advantage of Lord Dunedin as his principal colleague, the counsel on either side being Sir Edward Carson and Sir Douglas Hogg, the remorseless rhetoric of the one being in strong contrast with the cool adroitness of the other. The latter's reply for the prosecution was a triumph of ingenious pleading : he made his points with great skill, and with consummate address enlisted on behalf of his own case much of the evidence called on the other side.

## CONCLUSION

FROM this survey it will be gathered that in all Acts of State of the most significant gravity and importance, the Crown and the Council are inseparable for what covers the Imperial aspect of the Constitution in its most intimate working. While if much of their joint action has with the lapse of time become largely formal, it is none the less weighted with an inheritance of power and can appeal to the highest sanctions of age and authority. The Privy Council may even claim, as we have seen, to have brought into the play of modern forces many of the attributes of the past, and has besides in certain features of its activity got a grip on some of the highest values of the State, for there is no branch of the public service which, by its hold on the vehicles of higher education and the power to stimulate intellectual progress through the medium of chartered bodies, is in closer touch with the cultural development of the masses.

Moreover, the office of Lord President has never lost its lustre, in witness whereof it is only necessary to recall names such as Devonshire, Morley, Crewe, Curzon, and Balfour, which were associated with it in the first twenty years of this century.

Literature has no greater rights than the witness it bears to the magic of old institutions, and in the present day it would be difficult to find anything more ancient in the records of the past than the King of the Realm in Council, unless it were the

Papal Curia itself. The French monarchy surpassed it in antiquity, for it began, in the words of an eloquent writer, "when the heavy tramp of the Merovingian Kings was heard in the vaults of the *Thermæ*," but it is gone, and the proud place of the English Council remains in no ignoble testimony to the pomp it draws from the past and the glory to which the lapse of time can only contribute a brighter illumination. Let it be remembered at any cost that there is no greater aid to the just apprehension of the present than a mind which dwells with reverence upon its origins.

These reflections may well be brought to an end by a quotation from the work of one who has been with the present writer in spirit throughout the expansion of the story he has tried to tell. Professor Dicey concludes his *Essay on the Privy Council*, now nearly seventy years old, with these pregnant remarks :

"Whatever the amount of sympathy which the Council shall command, its history will be found the more instructive the more carefully it is studied, for it is nothing else than the history of all the greatest institutions which make up our national constitution. Our Parliament and our Law Courts are but the outgrowth of our Council. In its history is seen how not only institutions but ideas assumed their modern form. As we study the gradual separation of judicial, political, and administrative functions, it is perceived that the notions of 'Laws,' 'the State,' and 'the Government,' which are now so impressed on men's minds as almost to bear the delusive appearance of innate ideas, themselves grew up by slow degrees."



This helps us to understand the stages, as part of a gradual growth, by which we at length reach a clear apprehension of the past and learn to disentangle the complicated process which we politely term progress. Ideas offer us the survey of an evolution more impressive than the facts and conclusions with which they are often identified, for it is in them that reside those creative impulses which animate and inspire effort and in the long run assist us to overcome despondency and fortify patience, inasmuch as they draw from spiritual sources the highest endowments of the soul.

The peculiar significance animating the conditions of life in its political uses leave much to be explained if left to any summary analysis, but after all—

“The thoughts of men are widened with the process of the suns,”

and in the relations that group themselves round those who share in the struggles and ambitions of civic enterprise, much remains to justify and even exalt the rivalry.

Men are often better than their professions and the history of party warfare does not imply a dead loss to those engaged in it or to the reputation they leave behind them. So far as the anarchy of their thoughts permit, statesmen are no less wise than those they represent, though many of these last would betray astonishment at being asked to believe it. It is only from the salutary source of increasing wisdom that man must draw his hopes of the future and look for ever-fresh illumination upon the path before him.

## NOTE

### PRIVY COUNCIL SEAL

THE authentication of the Acts of the Privy Council by affixing thereto a special seal has been lately the subject of an illuminating contribution to the *English Historical Review* from the joint authorship of Messrs. Leonard Labaree and Robert Moody, of Yale University.

The origin of this form of attestation lay in the practice of using the Privy Seal for the purpose, supplemented, when such an officer came into being, by the signature of the Clerk of the Council. The use of this seal reached such proportions as led Professor Baldwin<sup>1</sup> to declare that from the list of these warrants "an extensive register of the Acts of the Privy Council could be reconstructed."

The industry of Messrs. Labaree and Moody points, however, to the conclusion that by the middle of the sixteenth century the existence of a Privy Council seal can be traced, when an entry in the register of May 20th, 1555, contains the following announcement :

"It was this day agreed that the King and Queenes Majesties shuld be moved that a Seale shuld be made with their lettres P and M, with a crowne over the same, with which seale all lettres passing the Boarde shuld be sealed, and the same to remayne in the custodie of the eldest Clerc of the Counsaill."

<sup>1</sup> Professor Baldwin, *The King's Council*, p. 420.

On the other hand, the Star Chamber continued to use to the end the Great Seal and the Privy Seal for its instruments. The legend round the first form of the Privy Council seal was “*Veritas temporis filia.*” In the reign of Elizabeth the initials E and R were united by a cord with the legend “*Pulcrum pro patria pati*”; later the Tudor Rose was supported by a lion and a dragon. No important change was made till after the Restoration, when with the legend on the scroll reading “*Sigill. Privi. Con.*” the Royal initials were omitted, thus dispensing with any further alteration till the union with Scotland. With that the rose was reduced in size and the Scottish thistle from a common stem added; and after the Union with Ireland, in 1802 the shamrock was added on the right with the rose in the centre, all three emblems branching from a common stem.

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